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No. 592

IN THE

Supreme Court of the United States

October Term, 1963

COCHEYSE J. GRIFFIN, ETC., ET AL.,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF ON BEHALF OF THE STATE BOARD OF EDUCATION AND SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF VIRGINIA.

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BRIEF ON BEHALF OF THE STATE BOARD OF EDUCATION AND SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF VIRGINIA.

PRELIMINARY STATEMENT

On November 7, 1962, the State Board of Education of the Commonwealth of Virginia and the Superintendent of Public Instruction of the Commonwealth of Virginia—hereafter referred to jointly as the State Board—filed a cross-appeal in the United States Court of Appeals for the Fourth Circuit from orders entered on October 10, 1962, by the United States District Court for the Eastern

District of Virginia (a) overruling the State Board's motion to dismiss the amended supplemental complaint (b) declining to abstain from determining the issues presented by the amended supplemental complaint (c) restraining and enjoining the State Board from processing or approving any applications for State scholarship grants from persons residing in Prince Edward County so long as the public schools of Prince Edward County remain closed and (d) holding generally that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers, if this portion of said judgment orders has such finality as permits appeal (R. 114).*

On August 12, 1963, the Court of Appeals vacated the judgments of the District Court and remanded the cause with instructions to abstain from conducting further proceedings until the Supreme Court of Appeals of Virginia had decided the then pending case of *County School Board of Prince Edward County, Virginia, et al.* v. *Leslie Francis Griffin, Sr., et al.*, and that decision had become final, with leave thereafter to entertain such further proceedings and enter such further orders as might then appear appropriate in light of the determinations of State law by the Supreme Court of Appeals of Virginia (R. 228, 229, 237, 238).

This judgment of the Court of Appeals was subsequently stayed by Mr. Justice Brennan on September 30, 1963, "pending the timely filing and disposition of a petition for a writ of certiorari." The case is now before this Court upon petition for certiorari allowed on January 6, 1964 (R. 240).

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* All references (R) are to pages in the printed record.

STATEMENT OF THE CASE

The State Board accepts and adopts the statement of the case set out in the joint brief on behalf of the County School Board and the Division Superintendent of Schools of Prince Edward County. Such facts in the case as may be particularly pertinent to the cross-appeal of the State Board and not included in the adopted statement of the case will be specifically stated in the body of this brief with appropriate references.

QUESTIONS PRESENTED ON APPEAL

The Notice of Appeal and the Motion to Dismiss which were filed on behalf of the State Board in this case are set out in the printed record. (R. 114-117). The following questions are presented in this case:

1. Does the amended supplemental complaint allege a new and distinct cause of action different from that set out in the original complaint? (Motion to Dismiss, Ground 1).

2. Is the instant suit one against the Commonwealth of Virginia within the prohibition of the Eleventh Amendment to the Constitution of the United States? (Motion to Dismiss, Ground 2).

3. Does the amended supplemental complaint state a claim against the State Board upon which relief can be granted? (Motion to Dismiss, Grounds 3 and 6).

4. Does the amended supplemental complaint seek relief which can only be granted by a District Court of three judges in accordance with 28 U.S.C.A. 2284? (Motion to Dismiss, Ground 5).

5. Are State scholarships available under Section 22-115.29 *et seq.* of the Virginia Code to persons residing in Prince Edward County while the public schools of such county are closed?

6. May the public schools of Prince Edward County be closed to avoid their operation on a racially integrated basis while public schools remain open in other localities of Virginia?

SUMMARY OF ARGUMENT

The instant respondents, State Board of Education and Superintendent of Public Instruction of the Commonwealth of Virginia, were not parties to the original school desegregation suit commenced in 1951 as *Davis* v. *County School Board of Prince Edward County* and decided here under *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294. On the contrary, the instant respondents were first made parties to this litigation by the amended supplemental complaint filed April 24, 1961. Since the entry of the order of the District Court permitting the amended supplemental complaint to be filed these respondents have consistently asserted—and continue to assert before this Court—various objections and defenses to the contentions of the petitioners.

Initially, we submit that the amended supplemental complaint alleges a new and distinct cause of action which is entirely different from that set out in the original complaint. The relief sought requires the joining of additional defendants who were not parties to the original complaint. The pleading before this Court states no cause of action against the original defendants and may not properly be filed as an amended supplemental complaint.

Moreover, we assert that the amended supplemental complaint seeks a peremptory writ of mandamus commanding these respondents, *inter alia*, to operate public schools in Prince Edward County. As such, it seeks to compel affirmative action by officials of the State in the performance of an alleged obligation of the Commonwealth of Virginia. A suit requesting such relief is, in its direct purpose and effect, a suit against the State within the prohibition of the Eleventh Amendment to the Constitution of the United States.

Furthermore, we contend that the amended supplemental complaint fails to specify any provision of the Constitution or statutes of Virginia which these respondents have failed or refused to exercise and that the amended supplemental complaint therefore fails to state a claim upon which relief can be granted against these respondents.

In addition, we submit that the amended supplemental complaint seeks to enjoin the operation, execution and administration of a State statute upon the ground that the statute in question is unconstitutional. The federal judicial power in such a case is exclusively vested in a District Court of three judges in accordance with 28 U.S.C.A. 2284.

Referring to these contentions, the Court of Appeals for the Fourth Circuit pointed out (322 F (2d) at 335):

> "For the District Court to get to the merits, it had to bypass a number of preliminary questions, including the very troublesome question arising under the Eleventh Amendment, all of which are brought up before us."

Due process of law requires that the above-stated contentions of these respondents cannot be ignored and must receive judicial review at some stage in these proceedings.

The District Court enjoined the execution and administration of the Virginia tuition grant statute upon the ground that such statute did not authorize payment of tuition grants for the education of children residing in localities in which public schools were not operated. On this point we insist that the District Court not only incorrectly interpreted the statute in question but also lacked jurisdiction to enjoin the statute upon the stated ground.

Finally, we submit that no provision of the Federal Constitution requires any State to operate public schools. In Virginia, the question of whether or not public schools shall be operated in a particular locality is referred to the governing body of each political subdivision by local option provisions of the Constitution of Virginia. Such local option provisions have been in effect in Virginia for more than sixty years and are constitutionally unassailable. Election by any political subdivision to discontinue the operation of public schools, rather than operate such schools on a racially integrated basis, infringes no constitutional right of the citizens of such locality. Moreover, federal courts have no judicial power to require any local governing body to levy taxes, appropriate funds and operate public schools in that locality.

ARGUMENT

I.

The Amended Supplemental Complaint Alleges A New And Distinct Cause Of Action Different From That Set Out In The Original Complaint.

This question has been discussed at length, and the applicable law thoroughly developed, in the brief on behalf of the County School Board and Division Superintendent of Schools of Prince Edward County. The State Board fully

agrees with the position there taken and adopts the statements there made as its argument upon this question.

II.

The Instant Suit Is One Against the Commonwealth of Virginia Within the Prohibition of the Eleventh Amendment to the Constitution of the United States.

The principal relief requested by the amended supplemental complaint in the case at bar is a *preremptory writ of mandamus* commanding the State Board, the local school board and the local board of supervisors to operate public schools in Prince Edward County. Of course, this relief is not requested in so many words; indeed, the term "writ of mandamus" does not appear in the prayer of the amended supplemental complaint. Instead, plaintiffs requested the District Court to enjoin and restrain the above mentioned parties:

> "(a) From refusing to maintain and operate an efficient system of public free schools in Prince Edward County, Virginia; . . ." (R. 27).

Counsel for the State Board submit that a suit requesting such relief is, in its direct purpose and effect, a suit against the Commonwealth of Virginia, which has not consented to be sued, and that the judicial power of the United States does not extend to such a suit.

The Eleventh Amendment to the Constitution of the United States provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Although the express language of the amendment under consideration would appear to prohibit only those suits against a State which are instituted by citizens of another State or of a foreign State, it is now well established that the amendment deprives Federal courts of the judicial power to entertain suits brought against a State by its own citizens. *Hans* v. *Louisiana*, 134 U. S. 1, *Ex parte New York*, 256 U. S. 490.

The construction placed upon the amendment by the above cited decisions is consistent with the observation of this Court in *Ex parte Ayers*, 123 U. S. 443, 505, that:

> "To secure the manifest purpose of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

So fundamental is the immunity conferred upon States by the Eleventh Amendment that it may be waived only by the State Legislature, and no official, by any act, can waive the immunity in question in the absence of a statute expressly conferring the State's consent to suit. *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459; *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47; *Parish* v. *State Banking Board*, 235 U. S. 498; *Title Guaranty & S. Co.* v. *Guernsey*, 205 F. 91; *Deseret Water, Oil & Irig. Co.* v. *California*, 202 F. 498, *cf.*, *Stanley* v. *Schwalby*, 162 U. S. 255; compare *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273.

Whether or not a particular action constitutes a suit against a State within the prohibition of the Eleventh Amendment is not determined by the identity of the parties named as defendants of record, but by the essential char-

acter of the proceedings, the relief requested and the result of the judgment or decree which may be entered. *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Ex parte, New York, supra; cf., Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682. This rule was well stated by this Court in *Ex parte New York, supra*, at 500, in the following language:

> "As to what is to be deemed a suit against a State . . . it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record."

Suits against officers of a State in their official capacity to compel affirmative action on their part or "the performance of an obligation which belongs to the State in its political capacity," constitute suits against a State which Federal courts are without authority to entertain under the Eleventh Amendment. *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & B. R. Co.*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U. S. 52; *North Carolina* v. *Temple*, 134 U. S. 22; *cf., Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Great Northern Life Ins. Co.* v. *Read, supra*.

This governing principle was dispositively enunciated in *Louisiana* v. *Jumel, supra*, in which case a suit for an injunction against State officials (to prohibit such officials from refusing to make payment on certain bonds and from refusing to collect taxes for future payments) instituted in a Federal court and a companion suit for mandamus (to compel the same officers to make such payments and collect such taxes) instituted in a State court were, upon removal of the latter suit, heard together in the Federal court. Holding that the two suits might "properly be considered to

gether . . . because they present substantially the same questions" and that both suits constituted suits against a State prohibited by the Eleventh Amendment, the Court declared (107 U. S. at 727-728):

> "Little need be said with special reference to the suit for *mandamus*. In this no trust is involved; but the simple question presented is, whether a single bondholder, or a committee of bondholders can, by the judicial writ of *mandamus*, compel the executive officers of the State to perform generally their several duties under the law . . . What they ask is that the auditor of state, the treasurer of state, and the board of liquidation may be required to enforce the Act of 1874, and 'carry out, perform and discharge each and every one of the ministerial acts, things and duties respectively required of them * * * according to the full and true intent and purport of that Act.' . . . The remedy sought, in order to be complete, *would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty* in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding to which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in

charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to *grant the relief asked for in either of these cases*, would be to exercise such a power." (Italics supplied)

In *Hagood* v. *Southern*, *supra*, suits were instituted by the holders of certain revenue bond scrip of the State of South Carolina against various officials of that State to require such officers to redeem the certificates in question, to receive them in payment of taxes and to collect special taxes pledged for the payment of such certificates by statute. Reversing decrees of the trial court which granted the requested relief, and remanding the causes with instructions to dismiss the bills of complaint, the Court observed (117 U. S. at 69, 70):

"If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in federal tribunals, it is difficult to conceive the frame of one which would be. * * * A judgment against these latter, [State officials] in their official and representative capacity, *commanding them to perform official functions on behalf of the State according to the dictates and decrees of the court*, is if anything can be a judicial proceeding against the State itself.

* * *

"A broad line of demarcation separates from such cases as the present, in which the decrees require by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the State in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void." (Italics supplied)

Similarly, in *North Carolina* v. *Temple, supra*, a bill in equity was filed by various bondholders to compel the Auditor of the State of North Carolina to raise a tax for the payment of the arrears of interest on certain State bonds. Instructing the trial court to dismiss the bill of complaint, the Court succinctly stated (134 U. S. at 30):

> "We think it perfectly clear that the suit against the auditor in this case was virtually a suit against the State of North Carolina. In this regard it comes within the principle of the cases of *Louisiana* v. *Jumel*, 107 U. S. 711 [27:448]; *Cunningham* v. *Macon & B. R. Co.*, 109 U. S. 446 [27:992]; *Hagood* v. *Southern*, 117 U. S. 52 [29:805], and *Ex parte Ayers*, 123 U. S. 443 [31:216]. We do not think it necessary to consider that question anew.
>
> "The other point, the suability of the State, is settled by the decision just rendered in *Hans* v. *Louisiana* [*ante*, 842].
>
> "To the question on which the judges of the circuit court were opposed in opinion, our answer is in the negative, namely, that the suit could not be maintained in the circuit court, against the State of North Carolina by the plaintiff, a citizen thereof."

In *Larson* v. *Domestic and Foreign Commerce Corp., supra*, this Court commented upon the nature of the suit under consideration in the *Temple* case in the following language (337 U. S. at 691, footnote 11):

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of *but will require affirmative action by the sovereign* or the disposition of unquestionably sov-

ereign property. North Carolina v. Temple, 134 US 22, 33 L ed 849, 10 S Ct 509 (1890)." (Italics supplied)

Under consideration in *Pennoyer* v. *McConnaughy, supra,* was a suit in equity by a citizen of California against certain officials of that State comprising the board of land commissioners to restrain and enjoin them from selling and conveying certain land to which petitioners asserted title. Holding that petitioner was entitled to the limited relief sought, the Court exhaustively reviewed its prior decisions under the Eleventh Admendment and pointed out (140 U. S. at 16-17, 18):

> "The dividing line between the cases to which we have referred and the class of cases in which it has been held that the State is a party defendant, and therefore not suable, by virtue of the inhibition contained in the Eleventh Amendment to the Constitution, was adverted to in *Cunningham* v. *Macon & B. R. Co.*, where it was said, referring to the case of *Davis* v. *Gray, supra: 'Nor was there in that case any affirmative relief* granted by ordering the governor and land commissioner *to perform any act towards perfecting the title of the company.'* 109 U. S. 453, 454 [27:994, 995], thus holding by implication at least, *that affirmative relief would not be granted against a state officer, by ordering him to do and perform acts forbidden by the law of his State, even though such law be unconsitutional.*
>
> "The same distinction was pointed out in *Hagood* v. *Southern*, which was held to be, in effect, a suit against the State, and it was said: 'A broad line of demarcation separates from such cases as the present, in which the decrees require, *by affirmative official action* on the part of the defendants, *the performance of an obligation which belongs to the State in its political*

capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void.'

* * *

"Little remains to be done or said by us in this connection, except to apply the principles announced in the cases we have attempted to review to the facts in the case before us, as set forth in our introductory statement. . . . It must also be observed that the plaintiff *is not seeking any affirmative relief against the State or any of its officers. He is not asking that the State be compelled to issue patents to him* for the land he claims to have purchased, *nor is he seeking to compel the defendants to do and perform any acts in connection with the subject matter of the controversy* requisite to complete his title. All that he asks is, that the defendants may be restrained and enjoined from doing certain acts which he alleges are violative of his contract made with the State when he purchased his lands. He merely asks that an injunction may issue against them to restrain them from acting under a statute of the State alleged to be unconstitutional, which acts will be destructive of his rights and privileges, and will work irreparable damage and mischief to his property rights." (Italics partially supplied)

In *Great Northern Life Insurance Co.* v. *Read*, *supra*, a suit against State officials by a foreign insurance company to recover taxes paid to the State of Oklahoma was held to be within the prohibition of the Eleventh Amendment, and the views expressed in the decisions canvassed above was commented upon in the following language (322 U. S. at 51):

"This ruling that a state could not be controlled by courts in the performance of its political duties through

> suits against its officials has been consistently followed. Chandler v. Dix, 194 US 590, 48 L ed 590, 24 S Ct 766; Fitts v. McGhee, 172 US 516, 529, 43 L ed 535, 541, 19 S Ct 269; Murray v. Wilson Distilling Co., 213 US 151, 167, 53 L ed 742, 750, 29 S Ct 458; Lankford v. Platte Iron Works Co., 235 US 461, 468, et seq., 59 L ed 316, 318, 35 S Ct 173; Re New York, 256 US 490, 500, 65 L ed 1057, 1062, 41 S Ct 588; Worcester County Trust Co. v. Riley, 302 US 292, 296, 299, 82 L ed 268, 273, 275, 58 S Ct 185. Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. Monaco v. Mississippi, 292 US 313, 320, 78 L ed 1282, 1284, 54 S Ct 745; Louisiana v. Jumel, 107 US 711, 720, 27 L ed 448, 451, 2 S Ct 128. . . ."

Finally, the language of the foregoing decisions was recently echoed in the Fourth Circuit by the three-judge District Court for the Eastern District of Virginia (Sobeloff and Haynsworth, Circuit Judges, and Hoffman, District Judge) in the celebrated case of *James* v. *Almond*, 170 F. Supp. 331, *app. dism.* 359 U. S. 1006. Having reviewed a number of the above cited decisions and concluded "that affirmative state action was held to be required in each instance," the Court declared (170 F. Supp. at 341):

> "The test is correctly stated in the recent case of Board of Supervisors of Louisiana State University & Agricultural & Mechanical College v. Ludley, 5 Cir., 252 F. 2d 372, 375, wherein an amendment to the Louisiana State Constitution specified certain state officials as 'special agencies of the State of Louisiana,' and withheld the consent of the State to be sued through any action against such officials. In holding that the suit was not one against the State, the court said:

> "'Full relief can be obtained from the named defendants *without requiring the State to take any affirmative action. This is the test.*'" (Italics supplied)

It is apparent from a mere reading of the amended supplemental complaint and the initial prayer for relief that the instant suit is essentially a suit for a writ of mandamus to compel affirmative action by officials of the State in the performance of an alleged obligation of the Commonwealth of Virginia. Indeed, in paragraph 14 of the amended supplemental complaint, plaintiffs allege that neither the Superintendent of Public Instruction nor the State Board of Education has "acted to discharge the State's constitutional obligation to provide and maintain an efficient system of public free schools" in Prince Edward County. This allegation discloses beyond cavil the fundamental character of the instant litigation.

In addition, as this litigation progressed, the strain of attempting to maintain the masquerade proved too great a burden for the plaintiffs to support. In their motion for further relief, filed after the decision of the Supreme Court of Appeals of Virginia in *Griffin* v. *Board of Supervisors*, 203 Va. 321, 124 S. E. (2d) 227, plaintiffs openly requested the District Court to:

> "(b) Enjoin *the Commonwealth of Virginia* from refusing to provide sufficient funds for the operation of the free public school system in Prince Edward County. . . .
>
> "(c) Enjoin *the Commonwealth of Virginia* . . . from failing and refusing to implement and effectuate in Prince Edward County the provisions of Article IX of the Constitution of Virginia and Title 22, Code of Virginia, 1950, as amended, . . ." (Italics supplied) (R. 126-127).

Although the plaintiff's motion for further relief was subsequently dismissed by the court (R. 87), the above quoted prayers specifically requesting relief against the Commonwealth of Virginia confirm the essential nature of the instant suit.

The device of requesting an order restraining the defendant from "refusing to maintain and operate an efficient system of public free schools" in Prince Edward County, Virginia—instead of an order directing the defendants "to maintain and operate an efficient system of public free schools" in that county—deceives no one and deserves no better fate than that accorded a similar stratagem in the *Jumel* case, *supra*. Similarly, as in the *Jumel* case, granting the requested relief would necessarily entail this Court's assuming the executive authority of the Commonwealth of Virginia so far as it relates to the administration of the Virginia public school laws and the supervision of all persons charged with any official duty in connection with such laws.

Manifestly, this Court cannot require the General Assembly of Virginia to make an appropriation of public funds, nor can it require a fiscal officer of the State (none of whom are parties to this litigation) to pay out public funds which have not been appropriated. Equally clear is it that this Court cannot require officials of the Commonwealth of Virginia affirmatively "to perform official functions on behalf of the State according to the dictates and decrees of the Court" (*Hagood v. Southern supra* at 69), or "to do and perform acts forbidden by the law of his State" (*Pennoyer* v. *McConnaughy, supra* at 16). Yet all of these undertakings are implicit in the relief requested by the plaintiffs and would be required of this Court if such relief were

to be granted. It is obvious, therefore, that a suit requesting such relief is, in its direct purpose and effect, a suit against a State within the prohibition of the Eleventh Amendment to the Constitution of the United States.

III.

The Amended Supplemental Complaint States No Claim Against These Defendants Upon Which Relief Can Be Granted

The Motion to Dismiss filed by the State Board on May 1, 1961, contained as two of its grounds, the following:

> "The Amended Supplemental Complaint fails to state a claim upon which relief can be granted."
>
> "No actual controversy exists between the parties to this suit, nor is there any present clash of contending legal interests between the parties."

The allegations of the Amended Supplemental Complaint made against the State Board are sufficient to give rise to consideration by the Court of only one of the prayers for relief, that being the first.

The first prayer was that the State Board, along with the others, be "enjoined and restrained * * * from refusing to maintain and operate an efficient system of public free schools in Prince Edward County, Virginia."

The motion of State Board was predicated on the belief that under existing State law they cannot do more in Prince Edward County than they are doing, that they have no duty or authority to do more, that they cannot establish schools in the County in the absence of local participation, that they have no funds (except approximately $40,000 annually, referred to as "constitutional funds") which they can send to Prince Edward County, and that they are, therefore, not subject to an injunction which would, in effect, require them

to do that which under State law they cannot do. Since they are performing every duty imposed upon them and exercising all authority vested in them, they have no controversy with the plaintiffs.

Since the District Court reserved judgment on the motion until after the evidence was heard, it is proper to consider the evidence heard by him in judging the correctness of his ruling.

The evidence presented was overwhelmingly to the effect that the State Board has no funds with which it might operate public schools in Prince Edward County without local participation. Indeed, the evidence was not only overwhelmingly, it was exclusively to that effect; so much so that after the plaintiffs had rested their case the District Judge interrupted the defendants' examination of Mr. J. G. Blount, Director, Division of Administration and Finance of the State Board of Education of Virginia, in the following manner:

> "Q. Now, let us take a few of these items as they come, Mr. Blount. Item 355 is for expenses of administration for the State Board of Education.
>
> "MR. DENNY: Would Your Honor care to have the Appropriation Act?
>
> "THE COURT: I do not object to your putting this in, but I, frankly, do not know the purpose of it.
>
> "MR. DENNY: The purpose of it, if Your Honor please, is this: It may or may not be perfectly clear in evidence that it has been alleged, as I understand it, in this amended supplemental complaint, or certainly by implication it seems to me to have been alleged, that there were funds available to the Department of Education which it, itself, might use in Prince Edward County in operating public schools, and that the State

Superintendent of Public Instruction and the State Department of Education have not so done. Now, that seems to me to be alleged in Section 4—

"THE COURT: Well, allegations are not proof. There has not been any proof tendered in support of that allegation, and the evidence so far seems to clearly indicate, and it has not been disputed, that the State Board does not have any funds for that purpose. I don't know what they might put on in rebuttal, but that is the evidence right now, as far as the Court is concerned.

"MR. DENNY: I shall be glad to save some time and abandon this if the plaintiffs will stipulate on the record, so that it may be available to them and this Court and any appellate court, that the State Board of Education and the Superintendent of Public Instruction have not had one penny of moneys with which they could operate public schools in Prince Edward County. If they are ready to stipulate that, I shan't ask this witness another question.

"They are not ready to stipulate it.

"THE COURT: Whether they stipulate it or whether they do not stipulate it does not convince the Court unless they offer proof to that effect. If you want to put it on until they put some proof on that they do have the money, you may do so, and then if they prove it, you will have a chance to rebut it." (See Tr. 478-479)*

As counsel for the defendant (School Board of Prince Edward County) examined Mr. Blount concerning individual items of the Appropriation Act, the Court again indicated the complete absence of evidence that the State Board had funds which it could use in Prince Edward County in the absence of local action:

* All references (Tr.) are to pages in the original transcript.

"THE COURT: I don't want to limit this, but, at the same time, I don't want all the administrators of all the acts to state what they do in every instance. I understood him clearly to say that he did not have any public funds to use for schools in Prince Edward County. Now, is that correct?

"THE WITNESS: Yes, sir.

"THE COURT: Now, I don't know how much more conclusive it could be by his reading all of these acts. Is that going to amplify it any?

"MR. DENNY: I have gone as far as I was going in detail, but I was going to ask him whether his answers would be similar answers to any other items in this appropriation bill under which any moneys were ever paid to county school boards.

"THE WITNESS: The answers would be the same.

"MR. DENNY: If Your Honor please, I said on yesterday I would have two witnesses. My friend, the Attorney General, has called them both, Mr. Wilkerson and Mr. Blount. I have no further evidence.

"THE COURT: No, the Attorney General did not call both of them; he called them jointly with you.

"MR. DENNY: I am always delighted to cooperate with him.

"THE COURT: Well, I am sure you are. Do you have any other questions of this witness?

"Do you have any, Mr. McIlwaine?

"BY MR. MCILWAINE:

"Q. You testified that there is no money available for the operation of public schools in Prince Edward County. By that, you mean operation by the State Board of Education?

"A. That was my intention in answering the question.

"Q. If the Board of Supervisors of Prince Edward County had appropriated funds to the School Board of Prince Edward County and the School Board of Prince Edward County undertook to operate public schools in the county again, then the State Board of Education would have available, would allocate, and would pay to the County School Board its appropriate share of the funds appropriated to the State Board of Education for this addition to the local School Board?

"A. Yes, sir." (See Tr. 487-489)

Woodrow W. Wilkerson, Superintendent of Public Instruction of Virginia had preceded Mr. Blount on the stand. He was called by the plaintiffs and testified, in part, as follows:

"Q. With reference to the disbursement of state funds appropriated for education, what is the function of your department?

"A. The funds are distributed to localities upon their having met certain conditions, and such disbursements are usually made and processed by one of my staff members.

* * *

"Q. So that really what I am trying to say, Mr. Wilkerson, is that the State, through your office or through the Department of Education, does provide funds for public school education in the several localities in the state, does it not?

"A. If the locality meets the conditions for the same.

"Q. Those conditions include standards that are prescribed by the State Board of Education?

"A. They include provisions as are specified in the Appropriation Act." (See Tr. 105 and 106)

Upon conclusion of the defendants' evidence, the plaintiffs had no additional evidence to offer (Tr. 511). Thus, it is clear that the evidence before the District Court was to the effect that these defendants have no funds with which they could comply with an injunction requiring them to refrain "from refusing to maintain and operate" schools in Prince Edward County. The evidence on this point could not have been different. An examination of the Appropriation Act in effect when the case was tried, the Appropriation Act now in effect, and every Appropriation Act as far back as 1918 (counsel have not had an opportunity to gain information as to earlier acts) will reveal that the situation is and has been just as depicted by the testimony. Mr. Blount has been with the State Department of Education for over thirty years (Tr. 466). He testified as follows:

> "Q. Mr. Blount, are there available to the State Board of Education at the present time any funds for the operation of public schools in Prince Edward County by the State Board of Education?
>
> "A. Yes, sir, there are funds available for any public school that is operating in the state.
>
> "Q. Do I understand your answer to the question is, if they are operating in Prince Edward County?
>
> "A. And if they meet the eligibility requirements set forth in the Appropriation Act.
>
> "Q. My question, if I stated it improperly, is this: Are there funds available to the State Board of Education which the State Board of Education may use in operating directly schools in Prince Edward County not under the supervision of the local School Board?
>
> "A. No, sir, there are not.
>
> "Q. To your knowledge, has there ever been an appropriation of any funds, during your tenure with

the State Board of Education, to the State Board of Education for the operation by it of schools in any locality?

"A. No, sir, there has never been any.

"Q. Is there any statutory authority or any regulation of the State Board of Education which authorizes the operation of public schools in any locality by the State Board of Education?

"A. No, sir, I do not know of any.

"Q. And, in all your years with the State Board of Education, has there been any statutory authority or ruling or regulatory authority for the operation of public schools in any locality by the State Board of Education divorced from the supervision of the local County School Board?

"A. Not to my knowledge." (Tr. 469-470)

It appeared from the testimony that not only was there an absence of funds but also an absence of authority in the State Board to operate schools in Prince Edward County. This fact, too, can be determined by an examination of the Constitution and statutes of Virginia.

As we approach such an examination it is important at the outset, to draw a sharp distinction between State Board and the General Assembly. The General Assembly of Virginia, as the legislative branch of the government of a sovereign state, possesses all legislative power not denied to it by the Federal or the State Constitutions. The State Board of Education and the Superintendent of Public Instruction, on the other hand, are created by the Constitution of Virginia. The people of Virginia, speaking through that instrument, have strictly limited their duties and their power.

The State Board of Education is given the following powers and no others, by the Constitution of Virginia:

1. General supervision of the school system. (Constitution of Virginia, Section 130.)

2. The powers and duties spelled out in Section 132 of the Constitution.

"§ 132. The duties and powers of the State Board of Education shall be as follows:

"First. It shall divide the State into appropriate school divisions, comprising not less than one county or city each, but no county or city shall be divided in the formation of such divisions. It shall certify to the local school board or boards of each division in the State a list of persons having reasonable academic and business qualifications for division superintendent of schools, one of whom shall be selected as the superintendent of schools for such division by the said school board or boards, as provided by section one hundred and thirty-three of this Constitution.

"Second. It shall have the management and investment of the school fund under regulations prescribed by law.

"Third. It shall have such authority to make rules and regulations for the management and conduct of the schools as the General Assembly may prescribe; but until otherwise provided by law, the State Board of Education may continue existing rules and regulations in force and amend or change the same.

"Fourth. It shall select textbooks and educational appliances for use in the schools of the State, exercising such discretion as it may see fit in the selection of books suitable for the schools in the cities and counties, respectively; provided, however, the General Assembly may prescribe the time in which the State Board of Education may change the textbooks."

In addition, there is an implied duty under Section 133 of the Constitution for the State Board to prepare a list of approved teachers.

The Superintendent of Public Instruction finds his source of power in Section 131 of the Constitution, which, after creating the office, merely provides that "the powers and duties of the Superintendent of Public Instruction shall be prescribed by law."

It becomes immediately apparent, we submit, that the State Board has neither the constitutional duty nor power to establish and maintain schools in any county or city of the State, for though we import the broadest meaning to every constitutional provision, there simply is no power in the State Board to create such public schools as we are now considering. Mr. Blount's testimony merely establishes the fact that the administrative interpretation is consistent with this finding.

We turn, then, from the Constitution to the statutes to determine whether the Legislature has placed such duty or conferred such power on the State Board. A thorough search has revealed to us no such legislation. To the contrary, certain sections evidence a clear lack of such action by the General Assembly.

Section 22-21 speaks volumes concerning the lack of such power in the State Board. It provides:

> "§ 22-21. The State Board is authorized and required to do all things necessary to stimulate and encourage local supervisory activities and interest in the improvement of the elementary and secondary schools, and, further, the State Board in its discretion may recommend provisions for standards for public and nonpublic kindergarten and nursery schools, provided, however, that no such nonpublic kindergarten or nur-

> sery school shall hold itself out to the public as having been sanctioned or approved by the State Board of Education."

We should note that while the State Board is "authorized and required," it is only authorized and required to "stimulate and encourage"; it is not "authorized to require." If there were authority in the State Board to establish schools or require their establishment, is it not certain that Section 22-21 would have authorized the State Board to require improvements, rather than merely "stimulate and encourage" them?

Even in the matter of compulsory attendance, while the State Board of Education has the authority and duty to see that the laws are enforced, the power is meaningless unless the local authorities first take action to bring the laws into force in their locality.

It is always difficult to cite authority for the absence of a power or duty. We can merely submit that we know of no such duty or power in the State Board and, indeed, throughout the long course of the "Prince Edward case" counsel for the plaintiffs therein have cited no statute imposing such duty upon the State Board.

We conclude, therefore, that there is a complete absence of duty upon or authority in the State Board to establish and maintain schools in a county or city of Virginia.

It was established that the State Board had neither the duty, authority, power nor funds with which to comply with the injunction prayed. It was also established that State funds were available to Prince Edward on the same basis as they were to every other political subdivision in the State. This was demonstrated by the excerpts from testimony of Mr. Blount, previously set forth, and can be further shown in his subsequent examination, as follows:

"Q. Of course, it goes without saying that were public schools being operated in Prince Edward County, it would have the right to share in these funds if it met the conditions applicable to that fund?

"A. That is correct." (Tr. 489).

With these unquestioned facts before it, the District Court should have concluded that the relief prayed could not be granted against the State Board and that, in actuality, there was no controversy. Instead, he overruled the motion, although he, too, concluded that he could not grant the relief prayed for in the Complaint. Instead of granting the relief prayed for, the Court *indicated a course of action which is not sought in any pleading before the Court.* These defendants cannot believe that this Court will give its approval to an injunction against them conditioned upon the performance of acts which they are without duty, power, authority or funds to perform. In such course of action the Court will, under existing Virginia law, make hostages of every public school child in Virginia until the Board of Supervisors of Prince Edward County sees fit to make available funds for the operation of public schools in the county. No court of equity should so condition an injunction. Nor should the Court permit such action by the District Court, out of concern for the welfare of the children of Prince Edward County, and in the hope or casual expectation that the General Assembly of Virginia can and will alter existing law. Whether the General Assembly will, or constitutionally can, alter the existing laws in a manner which would enable the State to operate schools in Prince Edward County without local funds being made available apparently is now settled in the negative by *School Board* v. *Griffin*, 204 Va. 650, 133 S. E. (2d) 565, when the Virginia Court said:

> "If the Constitution makes it the duty of the General Assembly to take over and operate the schools in Prince Edward county, it would have the same duty with respect to all other counties and cities of the State. The result would be a centralization of control and of operation foreign to the spirit as well as the letter of the Constitution, and the destruction of the system adopted in good faith obedience to the requirements of the Constitution and used now for more than sixty years.
>
> "We think it clear that the Constitution as written does not make that requirement."

The Court in *School Board* v. *Griffin, supra*, clearly held also that the State Board cannot reopen the schools in Prince Edward County without action at the local level. When that action is taken, these defendants are ready, willing and able to perform every duty imposed upon them, exercise every power conferred upon them, and release all funds (and funds are available when local action has been taken) available for the purpose, to the end that schools operate in Prince Edward County. Under Virginia law they can do no more; under Federal Court order no more should be required.

IV.

The Amended Supplemental Complaint Seeks Relief Which Can Only Be Granted by a District Court of Three Judges Convened Pursuant to 28 U. S. C. A. 2281.

The plaintiffs in their amended supplemental Bill of Complaint seek to enjoin and restrain all of the defendants, including the State Board of Education and the Superintendent of Public Instruction of Virginia; (a) from refusing to maintain and operate an efficient system of public free schools in Prince Edward County, Virginia; (b) from

expending public funds for the direct support of any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated; (c) from expending public funds in aid of, or in reimbursement of money paid for the attendance of any child at any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated.

The Honorable Judge of the United States District Court for the Eastern District of Virginia found that the closing of the public schools in Prince Edward County is prohibited by the Fourteenth Amendment of the Constitution of the United States and that it was unlawful for the Board of Supervisors of Prince Edward to pay local tuition grants authorized by State statute; and unlawful for the State of Virginia, the State Board of Education, the Superintendent of Public Instruction, the local School Board, or the local Superintendent to accept or process applications for State tuition grants or to pay State tuition grants. In rendering its opinion on the issue of State tuition grants, the Court held that the State statute providing for tuition grants did not authorize said grants to be paid in those Counties where there are no public schools operated. The District Court rendering this decision interpreted the State statute, although no State Court has ever construed the statute and although there was no evidence introduced to support this holding.

The Court enjoined the Board of Supervisors from paying local scholarship grants and enjoined the local School Board, local Division Superintendent, State Board of Education and State Superintendent of Public Instruction from receiving and processing applications, and from paying State tuition grants to residents of Prince Edward County. The District Court also "adjudged, ordered and decreed that the Public Schools of Prince Edward County,

may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayer." In view of the holding of the Supreme Court of Appeals of Virginia that there is no duty or obligation upon the Board of Supervisors of Prince Edward County to make any appropriation for public schools, *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S. E. 2d 227, the effect of the adjudication of the District Court, if implemented, would be to enjoin the State of Virginia, its officers, agents and employees from contributing financial support to and to enjoin the operation of public schools anywhere in the State of Virginia. Surely, in the record of American judicial annals no more drastic holding affecting the legislative enactments of a State Government has ever been rendered by any single United States District Judge.

Section 2281 of Title 28 of the United States Code provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of any order made by an administrative board of commission acting under State statutes, shall not be granted by any District Court or Judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a District Court of three judges under Section 2284 of this title."

In the case of *Frasier* v. *Board of Trustees of University of North Carolina*, 134 F. Supp. 589, a three-judge court

composed of Judge Soper, Circuit Judge, Judge Dobie, Circuit Judge, and Judge Hayes, District Judge, in an opinion of Judge Soper, held:

"Suit seeks declaratory judgment that certain orders of Board of Trustees of Consolidated University of North Carolina, which deny admission to the undergraduate schools of the institutions to members of the negro race, are in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. The plaintiffs also ask for an injunction restraining the university and its trustees and officers from denying admission to the undergraduate schools to negroes solely because of their race and color. The plaintiffs pray for relief under Rule 23(a) * * * as a class who passes the qualifications for entrance to the university * * *. The defendants contend that the case is not one for a three judge court because there is no constitutional or statutory provision which denies the admission of Negroes to the university or required the segregation of persons admitted to the university on account of their color.

"We hold, however, that jurisdiction exists in the Court, as now set up, because the statute 28 USCA Sec. 2281, requires a three judge court not only when it is sought to restrain the enforcement of an unconstitutional statute, but also the enforcement of an unconstitutional order of an administrative board or commission, clothed with authority and acting under the laws of the State. The jurisdiction of a three judge court was sustained under circumstances precisely similar to those in the case at bar in *Wilson* vs. *Board of Supervisors*, D.C. Ala. 92 F. Supp. 986, which was affirmed without opinion in 340 US 909, 71 S.Ct. 294, 95 L.Ed. 657, and 340 US 939, 71 S.Ct. 490, 95 L.Ed. 678. The decision was based on the ground that a three judge court is required when an injunction is sought because of the unconstitutionality of the order of a

State administrative board. It is beyond dispute that the State of North Carolina, both of constitution and by statute, has clothed the Board of Trustees of the University with authority to make such rules and regulations for the management of the institution as they deem necessary and expedient, and it follows that the regulations now under attack, must be considered a 'statute' to which the State has given its sanction within the meaning of the jurisdictional provisions of 28 USC Sec. 2281. See *American Federation of Labor* vs. *Watson*, 327 US 582, 592, 66 S.Ct. 761, 90 L.Ed. 873, *Oklahoma Natural Gas Co.* vs. *Russell*, 261 US 290, 43 S.Ct. 353, 67 L.Ed. 659. In *McCormick & Co.* vs. *Brown*, 4 Cir. 52 F. 2d 934, 937, it was said: '* * * it is settled that a Court of three judges is required not only when the constitutionality of the State statute is involved, but also when the constitutionality of an order of a State administrative board or commission purporting to be authorized by State statute, is drawn into questions.' See also *Suncrest Lumber Co.* vs. *North Carolina Park Comm.*, 4 CCA, 29 F. 2d 823, appeal dismissed without consideration, 280 US 615, 50 S.Ct. 13, 74 L.Ed. 656." 134 F. Supp. at 590, 591, 592; Affirmed, per curiam, 350 US 979, 100 L.Ed. 848, 76 S.Ct. 467.

In an earlier case, *Suncrest Lumber Co.* v. *North Carolina Park Commission*, 29 F. 2d 823 (4th CCA—Nov. 27, 1929), the Court, in an opinion by the late Judge Parker, held:

"At the threshold of the case we are confronted with the question of jurisdiction. There can be no question that complainant sought an interlocutory injunction to restrain the enforcement and execution of a statute of the State of North Carolina on the ground that the statute was unconstitutional. If, therefore, the persons sought to be restrained by the injunction are officers of

the State, there can be no doubt that the case falls squarely within the provisions of Section 266 of the Judicial Code (28 USCA Sec. 380), which requires a Court of three judges, and hence that the Judge before was without jurisdiction to enter the order complained of. * * *

"And we think there can be no doubt that defendants are officers of the State within the ordinary meaning of these words and within the meaning intended by Section 266 of the Judicial Code. It is true that the North Carolina Park Commission is created a body 'politic and corporate'; but it is created such not as an ordinary corporation but as an agency of the State of North Carolina, to exercise sovereign powers in behalf of the State and in its name. * * *.

"And when we consider the reason and spirit of the statute, which has been incorporated in the Judicial Code as Section 266, we think that defendants are clearly officers of the State within its meaning. That statute was enacted because it was thought unseemly that one District Judge should stop the officers of a State in the enforcement of its laws, and thereby, in effect, set aside the deliberate act of its legislature. The defendants here have been expressly designated by the Legislature to carry out the park project upon which the State has embarked in cooperation with the State of Tennessee and the National Government. They represent not a county or locality, as in the Henrietta Mills case, supra, but the State itself, and an injunction restraining them would, in effect, restrain the action of the State and would set aside the action of the State Legislature.

"For these reasons the learned District Judge was without power to pass upon the applications for interlocutory injunction without calling to his assistance two other judges, as required by Section 266 of the Judicial Code, and his attempted action is void. Ex-parte Metropolitan Water Co., 220 US 539, 31 S.Ct.

> 600, 55 L.Ed. 575. We cannot pass upon the matter here because the appeal from the Court of Three Judges is not to this Court but to the Supreme Court. The order appealed from will be set aside, therefore, and the case will be remanded to the District Court for further proceedings not inconsistent with this opinion, order set aside, cause remanded." 29 F.2d at 823, 824.

The basic factual circumstances in each of the above referred to cases were similar to those in the case now before this Court. One or more persons were seeking to enjoin and restrain State Boards or Commissions from performing their duties pursuant to State laws. In the instant case, State and local officers and the State Board of Education are enjoined from paying tuition grants under State law and are told they will be enjoined and restrained from permitting public schools over the entire State of Virginia from being operated as authorized by State law and State constitution.

This Court held in the case arising out of the declaring of martial law by the Governor of Texas in the oil fields of Texas when the State sought to limit production of oil:

> "Nor does the fact that it may appear that the State officer in such case, while acting under color of State law, has exceeded the authority conferred by statute, deprived the Court of jurisdiction. * * * As the validity of provisions of the State constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. Stratton vs. St. Louis Southwestern R. Co. 282, US 10, 51 S.Ct. 8, 75 L.Ed. 135. The Jurisdiction of the District Court so constituted and of this Court upon appeal, extends to every question involved, whether of State or Federal law, and enables the Court to rest its judgment on the

decision of such of the questions as in its opinion effectively dispose of the case." *Sterling, Governor of Texas* vs. *Constantin* and *Constantin* vs. *Smith*, 287 US 378.

Your defendants are not unmindful of the opinion of the three judge court as originally convened before whom the original Prince Edward suit was tried. That opinion held, after the *Brown Decision*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873; Id., 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, as follows:

"Argument has been had on the suggestion from the Court that the participation of three judges is no longer necessary and that the Judges other than the Judge before whom the case was originally brought should retire therefrom, since the questions of the validity of the State constitutional and statutory provisions have been settled, these provisions have been declared invalid and all that remains in the case is the enforcement of constitutional rights without reference to any State constitutional or statutory provisions. We think it clear that this course should be taken. * * * It is perfectly clear in this case that with the unconstitutionality of the Virginia statute and constitutional provision definitely adjudicated, the questions raised by the subsequent motion are not within the statutory purpose for which the two additional judges had been called. In such situation, the three judge court should be dissolved and the two additional judges should retire from the case. *Bush* vs. *Orleans Parish School Board*, D. C. 138 F. Supp. 336, mandamus denied by the Supreme Court 76 S. Ct. 854; *Kelly* vs. *Board of Education*, D. C. 139 F. Supp. 578; *Booker* vs. *State of Tennessee Board of Education*, 76 S.Ct. 856. In the cases cited, three judge courts which had been constituted to hear school segregation cases were dissolved on the ground

> that no substantial question as to the constitutionality of the State statute remained after the decision of the Supreme Court holding statutes requiring segregation to be unconstitutional and invalid; and the Supreme Court denied application to leave to file petitions for writs of mandamus requiring that they be heard before three judge courts." *Davis* vs. *County School Board of Prince Edward County* (D.C. E.D. Va.), 142 F. Supp. 616 at 617, 619.

It is respectfully submitted that the three judge court in the above opinion of the late Chief Judge Parker was referring to the State statutes and constitutional provisions requiring segregation in the public schools of Virginia. In the present case entirely different statutes and constitutional provisions of the State of Virginia are involved. The entire school code, and appropriations act of the State are directly involved in this litigation and the questions presented in this case as to whether or not said provisions of State law and the actions of State and local boards and officers acting pursuant thereto are repugnant to the Fourteenth Amendment of the United States Constitution have never been presented to, much less decided by, any State or Federal Court prior to the filing of the Supplemental Bill of Complaint in this case. Therefore, the District Court acting through a single district judge had no jurisdiction to pass upon this case on its merits and this Honorable Court has no jurisdiction since 28 U.S.C.A. Sec. 2281 and 28 U.S.C.A. Sec. 1253 requires a three judge district court with direct appeal to the Supreme Court of the United States. See *Query* v. *United States*, 316 U. S. 486, where it was held:

> "Here a substantial charge has been made that a State statute as applied to the complainants violates the Con-

stitution. Under such circumstances we have held that relief in the form of an injunction can be afforded only by a three judge court pursuant to Sec. 266 (now Sec. 2281) * * *. Since there was such complete satisfaction of the conditions which make Section 266 applicable, the cause was a proper one for a three judge court and appeal did not lie to the Circuit Court of Appeals." 316 U. S. at 490.

One of the most complete and frequently cited decisions on procedural issues of the special three judge court is that of *Stratton* v. *St. Louis South Western R. Co.*, 282 U. S. 10, where in a decision by Chief Justice Hughes, the Court unanimously held:

"If an application for an interlocutory injunction is made and pressed to restraining the enforcement of the State statute of an administrative order made pursuant to a State statute upon the ground that such enforcement would be in violation of the Federal Constitution, a single Judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. He is as much without power to dismiss the bill on the merits as he would be to grant either an interlocutory or a permanent injunction. * * *

"If a single judge, thus acting without jurisdiction, undertakes to enter an order granting a interlocutory injunction on a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement. Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat

the purpose of the statute by substituting a decree of a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this court. * * *

"It follows that in the present case, no appeal lay to the Circuit Court of Appeals, and that court should have dismissed the appeal for want of jurisdiction. * * *

"The requirement of the statute has regard to substance and not to form. It matters not whether the injunction is called preliminary or interlocutory, or is styled a temporary restraining order, if it is granted to restrain the enforcement of State legislation * * * as the proceeding in this suit fell within the provisions of the statute and the District Judge had no jurisdiction to hear the motion to dismiss the bill on the merits, the consent of the parties could not give validity to the decree or confer jurisdiction upon the Circuit Court of Appeals to entertain an appeal therefrom. * * *

"The remedy by mandamus to vacate the decree and to require the District Judge to call to his assistance two other Judges, as directed by the statute, to hear the application for an interlocutory injunction, is still available. It is not necessary, however, that formal application should be made for such a writ, as the District Judge may now proceed to take the action which the writ, if issued, would require.

"When it appears, on the appeal to this court from a decree of the Circuit Court of Appeals, that the latter Court has acted without jurisdiction in entertaining the appeal from the District Court, the appropriate action of this Court is to reverse the decree of the Circuit Court of Appeals and to remand the case with directions to dismiss the appeal to that Court for want of jurisdiction." 282 U. S. at 15, 16, 17, 18; 75 L. Ed. at 138, 139, 140.

The most recent detailed holding and opinion on this subject by this Court is that in the decision of the Court writ-

ten by Mr. Justice Whittaker in the case of *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U. S. 73. The lime and avocado growers, engaged in the business of growing, packing, and marketing in commerce, Florida Avocados, brought the action in the District Court of California to enjoin the state officers of California from enforcing a provision of the California Agricultural Code. The Growers alleged that the action of the California State officials in barring shipments of Florida grown avocados into California was in violation of the Commerce and Equal Protection clauses of the United States Constitution as well as of the Federal Agricultural Marketing Agreement Act of 1937, and Florida Avocado Order No. 69 issued thereunder.

The growers requested a three judge District Court pursuant to 28 U.S.C. Sec. 2281 to hear the case. After hearing, the District Court, concluded that because appellants had not contested the validity of the California statute nor sought abatement of the state officers condemnation of the avocados in the California State Courts the case presented "no more than a mere prospect interference posed by the bare existence of the law in question," and that it had "no authority to take jurisdiction and was left with no course other than to dismiss the action," which it did. 169 F. Supp. 774, 776.

The case was appealed to the Supreme Court of the United States on direct appeal under 28 U.S.C. Sec. 1253. This Court held:

> "Section 2281 seems rather plainly to indicate a congressional intention to require an application for an injunction to be heard and determined by a court of three judges in any case in which the injunction may be granted on grounds of Federal unconstitutionality. * * * Section 2281 * * * seems clearly to require that

when, in any action to enjoin enforcement of a State statute, the injunctive decree *may issue* (italics supplied) on the ground of Federal unconstitutionality of the State statute, the convening of a three-judge court is necessary; and the joining in the complaint of a non-constitutional attack along with the constitutional one does not dispense with the necessity to convene such a Court. To hold to the contrary would be to permit *one* federal district judge to enjoin enforcement of a State statute on the ground of Federal unconstitutionality whenever a non-constitutional ground of attack was also alleged, and this might well defeat the purpose of Sec. 2281. * * *

"Indeed, the cases since 1925 have continued to maintain the view that if the constitutional claim against the State statute is substantial, a three judge court is required to be convened and has jurisdiction as do we on direct appeal, over *all* grounds of attack against the statute.

* * *

"To hold that only one judge may hear and decide an action to enjoin the enforcement of a State statute on both constitutional and non-constitutional grounds would be to ignore the explicit language and manifest purpose of Sec. 2281, which is to provide for a three judge court wherever an injunction sought against a State statute may be granted on Federal constitutional grounds. Where a complainant seeks to enjoin a State statute on substantial grounds of Federal unconstitutionality then even though non-constitutional grounds of attack are also alleged, we think the case is one that is required by . . . Act of Congress to be heard and determined by a District Court of *three* judges. 28 USC S 1253." 362 U.S. at 76, 77, 80, 84, 85.

The plaintiffs in the amended Supplemental Complaint requested the District Court to enjoin and restrain the de-

fendants from conveying, leasing, or transferring title to certain school buildings, pursuant to Secs. 22-161.1 through 22-161.5 of the Code of Virginia. The plaintiffs did not question the authority of the defendants to make such transfers or conveyances under the State statutes cited above but stated that said transfers and conveyances would violate the rights of the plaintiffs guaranteed under the Due Process and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The plaintiffs also alleged in the Amended Supplemental Complaint that the action of the defendants, acting under State statutes, refusing to operate and maintain public free schools in Prince Edward County violated Section 129 of the Constitution of Virginia and violated the Due Process and Equal Protection Clauses of the Constitution of the United States.

With these allegations and prayers in the Amended Supplemental Complaint, the District Judge was required to have a three judge court appointed to hear the case. The suit was one to enjoin the enforcement of one or more State statutes, and on the issues present, the plaintiffs requested an "injunctive decree (which) may issue on the grounds of Federal unconstitutionality of the State statute." Therefore, "the convening of a three judge court is necessary and the joining in the complaint of a nonconstitutional attack along with the constitutional one does not dispense with the necessity to convene such a court." *Florida Lime and Avocado Growers* v. *Jacobsen, supra;* 362 U. S. at p. 80.

In the Amended Supplemental Complaint, the plaintiffs in addition to the above alleged ground for injunctive relief against the defendants which were also contained in the supplemental complaint added additional ones seeking to enjoin the payment of state and local scholarship grants as

clearly authorized by state statutes. The only grounds alleged in the attack on the action of the defendants in regard to scholarship payments were that said actions as authorized by State statutes, violated the Due Process and Equal Protection Clauses of the Constitution of the United States. Clearly a three judge court was required and should have been appointed. The single District Judge had no jurisdiction to continue to hear the case on its merits and this Honorable Court has no jurisdiction to hear the appeal on its merits. The only thing this Honorable Court can do is to dismiss the appeal and send the case back to the District Court with an order that a three judge court be convened.

V.

State Scholarships Are Available Under Section 22-115.29 et seq. of the Virginia Code to Persons Residing in Prince Edward County While the Public Schools of Such County Are Closed.

In their amended supplemental complaint, plaintiffs requested the District Court to enjoin the State Board, the local school board and the local board of supervisors from expending public funds "for the direct or indirect support of any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated" or in aid of the attendance of any child at such a school (R. 27-28). The District Court did not grant this relief, but it did enjoin the State Board from processing or approving applications for State scholarship grants from persons residing in Prince Edward County so long as the public schools of that county remained closed (R. 65, 67, 87). This wholly unrequested relief was predicated upon the District Court's construction of the State scholarship law, Section 22-115.29 of the Virginia Code, to exclude from eligibility children residing in localities in which public schools are not operated.

Counsel for the State Board submit that the District Court was utterly without authority to enjoin the statute in question upon the stated ground. No citation of authority is required to establish the proposition that a suit instituted by residents of Prince Edward County, Virginia, to enjoin State officials from expending funds upon the ground that such expenditures were not authorized by State law would lack both diversity of citizenship and a "Federal question," one of which is indispensable to the jurisdiction of a Federal court. Similarly, administration of a State statute which is not found to violate either the Constitution or laws of the United States may not be enjoined by a Federal court upon the ground that such administrative action is not authorized by the statute in question.

In attempting a wholly gratuitous interpretation of the State scholarship law, the District Court fell into error so obvious as to be evident from a mere reading of the statute which the District Court purported to construe. Analysis of that statute furnishes irrefutable intrinsic support for the view that the State scholarships therein established are available for the education of every child of school age residing in a political subdivision of the Commonwealth of Virginia regardless of whether or not public schools are operated in a particular locality. Indeed, in its authoritative interpretation of the statute in question in *School Board* v. *Griffin*, 204 Va. 650, 133 S. E. (2d) 565, the Supreme Court of Appeals of Virginia conclusively declared (204 Va. at 668, 669):

> "As noted above, the trial court decided that the payment of State scholarship grants to the parents of children residing in Prince Edward county is not conditioned upon the operation of public free schools in

> the county and that such scholarships are available under §§ 22-115.29 *ff.* of the Code even though the public schools in the county are closed.
>
> * * *
>
> "We perceive nothing *in or out of* the statutes to render these scholarships unavailable to any eligible child in Prince Edward county whether public free schools are operated in the county or not." (Italics supplied)

In light of the foregoing, it is clear that State scholarships provided by Section 22-115.29 *et seq.* of the Virginia Code are available to parents of children of school age residing in Prince Edward County, whether public schools are operated in that county or not.

VI.

The Public Schools of Prince Edward County May Be Closed to Avoid Their Operation On a Racially Integrated Basis While Public Schools Remain Open in Other Localities of Virginia.

In Argument III of this brief, it has been demonstrated that the State Board has no duty or authority to reopen and operate schools in Prince Edward County under the Constitution and statutes of Virginia. The law and the evidence which establish that fact clearly reveal that the State has a truly local option system in which State funds are made available in a number of categories on a basis of local matching. It is significant that under that system practically every political subdivision elects not to participate in some one or more of the funds available. Prince Edward County has elected not to participate in any.

It is our purpose here to show that the Supreme Court of Appeals of Virginia has recognized the local option structure of the public school system in the Commonwealth and

to demonstrate that such system does not violate the Fourteenth Amendment.

Recognition by the Virginia Supreme Court of the local option character of the Virginia public school system is easily and conclusively evidenced by the recent decisions of that Court in the celebrated cases of *Griffin* v. *Board of Supervisors*, 203 Va. 321, 124 S. E. (2d) 227 and *Harrison* v. *Day*, 200 Va. 439, 106 S. E. (2d) 636. In the former case, the Court held that Section 136 of the Virginia Constitution vested in "the local authorities" the exclusive power to determine what sums—if any—should be raised by local taxation for the operation of public schools in a locality, that this exclusive power could not be "taken away" by the General Assembly and that its exercise could not be compelled by writ of mandamus. *Id.* at 326, 329. In the latter case, the Court invalidated a series of enactments of the General Assembly of Virginia upon the ground that the statutes in question were violative of Sections 133 and 136 of the Virginia Constitution which vested supervision of the local schools and expenditures of local school taxes in the local school boards. Specifically, the Court declared (200 Va. at 452):

> "Again, the Act of 1956, Ex. Sess., ch. 68, p. 69 (Code, 1958 Cum. Supp., §22-188.30 *ff.*), providing for the closing of schools because of integration, divesting local authorities of all power and control over them, and vesting such authority in the Governor, violates Section 133 of the Constitution which vests the supervision of local schools in the local school boards. *School Board* v. *Shockley*, *supra*, 160 Va., at page 409.
>
> "Similarly, the Act of 1956, Ex. Sess., ch. 69, p. 72 (Code, 1958 Cum. Supp., §22-188.30 *ff.*), providing for the establishment and operation of a State school

system to be administered by the Governor and under the supervision of the State Board of Education, violates Section 133.

"Section 11 of this Act (Code, 1958 Cum. Supp., §22-188.40) directs that local levies authorized under the Act be paid into the State treasury to be expended by the State Board of Education in such localities. This runs counter to Section 136 of the Constitution which requires that local school taxes be expended by the 'local school authorities.'

"The Act of 1958, ch. 41, p. 26 (Code, 1958 Cum. Supp., §22-188.41 *ff.*), and the Act of 1958, ch. 319, p. 367 (Code, 1958 Cum. Supp., §22-188.46 *ff.*), provide for the closing of schools in communities which may be disturbed because of the presence in, and policing of, such schools by federal troops and personnel. Under the provisions of these chapters such schools are automatically closed. When a school is closed under these provisions all authority over it is taken from the local school authorities and vested in the Governor. (Code, 1958 Cum. Supp., §§ 22-188.43, 22-188.44, 22-188.47, 22-188.48.) While we agree that the State, under its police power, has the right under these conditions to direct the temporary closing of a school, the provision divesting the local authorities of their control and vesting such authority in the Governor runs counter to Section 133 of the Constitution."

Consistent with the views expressed in the above-canvassed decisions is that enunciated by the Supreme Court of Appeals of Virginia in the recent case of *School Board* v. *Griffin*, 204 Va. 650, 668, 133 S. E. (2d) 565, in the following language:

"The Debates of the Constitutional Convention on the report of the Committee on Education and Public Instruction, from which came the present constitu-

> tional provisions, indicate that the method adopted by the General Assembly is in keeping with the requirements of Article IX. In the course of the debate an amendment was offered which would have required the State constitutional funds to be used to maintain primary schools for at least four months in each year. The proposed amendment did not find support and was withdrawn. Debates Constitutional Convention 1901-1902, vol. 1, pp. 1213-1218, 1229-1231. In the entire debate on the report no member made the direct proposal that the operation of the schools be placed in other than local hands. The proceedings indicate a purpose to leave the State only with the duty of establishing a system which would *enlist the support of the localities and leave to them the determination of the number and character of the schools they were willing to operate.* A member of the committee expressed it to be his understanding that 'the report of this committee has as its *underlying principle* and its basis *local self-government and home rule.' 'The discretion as to whether any or all schools are established is first vested in the local trustees,* * * *' (Debates, pp. 1227-8)." (Italics supplied)

In light of these decisions, it is clear that the local option feature of the Virginia public school system is—and for more than half a century has been—woven into the organic law of the State.

At this point it should be emphasized that the Fourteenth Amendment does not require any State to operate public schools or provide any form of free public education. Supportive of this fundamental proposition are three recent decisions of Federal courts in Virginia. In the celebrated case of *James* v. *Almond*, 170 F. Supp. 331, the three-judge District Court (Sobeloff and Haynsworth, Circuit Judges, and Hoffman, District Judge) flatly declared (170 F. Supp. at 337):

> "We do not suggest that, aside from the Constitution of Virginia, the State must maintain a public school system. *That is a matter for State determination.*" (Italics supplied)

Subsequently, in *Allen* v. *County School Board of Prince Edward County*, Civil Action No. 1333, the Court (Lewis, J.) dismissed a motion of the United States to intervene as a party plaintiff and, during the course of its opinion, proclaimed (unreported opinion at page 21):

> *"This Court knows of no provision of the United States Constitution which provides that the states shall provide a system of free public education and none has been cited."* (Italics supplied)

Finally, in the instant case, the United States Court of Appeals for the Fourth Circuit pointed out (322 F. (2d) at 336):

> "On the principal issue, the question whether the plaintiffs have a judicially enforceable right to have free public schools operated in Prince Edward County, the plaintiffs contend that the closure of the schools, taken either alone or in conjunction with the subsequent formation of the Prince Edward School Foundation and its operation of private schools for white pupils only, was the kind of 'evasive scheme' for the perpetuation of segregation in publicly operated schools which was condemned in Cooper v. Aaron, 358 U.S. 1. The United States, as *amicus curiae* advances a different principle, contending that there is a denial of the Fourteenth Amendment's guarantee of equal protection of the laws when the Commonwealth of Virginia suffers the schools of Prince Edward County to remain closed, while schools elsewhere in the state are operated.

"As to the plaintiffs' contention, *it may be summarily dismissed in so far as it is viewed as a contention that the Fourteenth Amendment requires every state and every school district in every state to operate free public schools in which pupils of all races shall receive instruction.* The negative application of the Fourteenth Amendment is too well settled for argument. It prohibits discrimination by a state, or one of its subdivisions, against a pupil because of his race, but *there is nothing in the Fourteenth Amendment which requires a state, or any of its political subdivisions with freedom to decide for itself, to provide schooling for any of its citizens.* Schools that are operated must be made available to all citizens without regard to race, *but what public schools a state provides is not the subject of constitutional command.*" (Italics supplied)

In light of the above quoted decisions, it is manifest that the Commonwealth of Virginia is under no obligation imposed by the Constitution of the United States to operate public schools.

Being under no such obligation, the people of Virginia, by provision in the organic law of the State, have reserved to the various localities of the State *exclusively* the determination of whether or not public schools shall be established and operated in any particular locality.

Local option provisions of State laws present no question of conflict with the Fourteenth Amendment. The most recent pronouncement of this Court upon this point appears to be contained in *Salsburg* v. *Maryland*, 346 U. S. 545, in which case the Court sustained a Maryland statute authorizing the admission of illegally obtained evidence in certain prosecutions in Anne Arundel County while prohibiting the admission of such evidence in similar prosecutions in other counties of the State. Rejecting the contention that

the statute under consideration was violative of the Fourteenth Amendment, the Court declared (346 U. S. at 552):

> "*There seems to be no doubt that Maryland could validly grant home rule to each of its 23 counties and to the City of Baltimore to determine this rule of evidence by local option.* It is equally clear, although less usual, that a state legislature may itself determine such an issue for each of its local subdivisions, having in mind the needs and desires of each. *Territorial uniformity is not a constitutional requisite.*" (Italics supplied)

In *Ohio ex rel. Lloyd* v. *Dollison*, 194 U. S. 445, this Court had occasion to consider the constitutional validity of the Beal Local Option Law of Ohio. Affirming a judgment of conviction for violation of this enactment, the Court observed (194 U. S. at 448-449):

> "Plaintiff in error further urges that to make an act a crime in certain territory and permit it outside of such territory is to deny to the citizens of the state the equal operation of the criminal laws; and this he charges against, and makes a ground of objection to, the Ohio statute. *This objection goes to the power of the state to pass a local option law; which, we think, is not an open question.* The power of the state over the liquor traffic we have had occasion very recently to decide. We said, affirming prior cases, the sale of liquor by retail may be absolutely prohibited by a state. *Cronin* v. *Adams*, 192 U. S. 108, *ante*, 365, 24 Sup. Ct. Rep. 219. That being so, the power to prohibit it conditionally was asserted, and the local option law of the state of Texas was sustained." (Italics supplied)

See, also, *Rippey* v. *Texas*, 193 U. S. 504; *Ft. Smith Light and Traction Co.* v. *Board of Improvement*, 274 U. S. 387.

Numerous examples of local option provisions of Virginia law similar to that embraced in the Virginia school laws exist. Sections 16.1-201 and 16.1-202 of the Virginia Code provide for the establishment of local juvenile detention facilities. No county or city is required to construct a detention home; however, if a locality elects to establish such an institution, the State will provide funds to aid in the cost of construction and will participate in furnishing and equipping the structure as well as paying the salaries of operational personnel.

Section 32-292 *et seq* of the Virginia Code makes provision for a State-local hospitalization program. There is no requirement that any county or city operate such a program; however, if a locality elects to do so, the State will reimburse one-half of the cost of such hospitalization within the limits of an appropriation made by the Legislature for that purpose. Localities which have not elected to inaugurate such a hospitalization program appropriate no money for such purpose and receive no State aid. Surely, no one can suggest that if the governing body of Prince Edward County exercised its local option by declining to establish a juvenile detention facility or to inaugurate a hospitalization program any rights guaranteed citizens of Prince Edward County by the Fourteenth Amendment would be infringed by the State's continuing to furnish funds to other localities which might elect to undertake such programs.

Continuing the citation of examples of local option provisions similar to those existing under State law, the Court of Appeals for the Fourth Circuit in the case at bar observed (322 F. (2d) at 342):

> "Federal analogies readily come to mind. The United States makes available to participating states which

> enact prescribed legislation, grants for unemployment, compensation administration. Under the National Defense Education Act, federal funds are made available to localities conducting in their schools approved programs of science, mathematics and foreign languages. *It is suggested that there is no geographic discrimination in the provision for such optional grants, though a state or locality may exercise its option not to participate.*
>
> "*Such local-option provisions as those the defendants think analogous are constitutionally unassailable.* When a state undertakes to encourage local conduct of educational or social programs by making matching funds available to participating localities, *there is no discrimination against nonparticipating localities. Since every locality may participate if it wishes to do so, and the state funds are available to each upon the same conditions, the state is evenhanded.*" (Italics supplied)

Clearly, the historic "local option" feature of the Virginia public school laws infringes no rights guaranteed citizens of any locality by the Fourteenth Amendment. Equally certain is that if a locality exercises its option by declining to operate public schools rather than operate such schools on a racially integrated basis, no constitutional right of the citizens of that locality are violated. A series of recent decisions combines to establish the validity of this position beyond dispute. *Tonkins* v. *City of Greensboro*, 162 F. Supp. 549, *aff'd. per curiam* 4 Cir., 276 F. (2d) 890; *Gilmore* v. *City of Montgomery*, 176 F. Supp. 776, *aff'd.* 5 Cir., 277 F. (2d) 364; *Clark* v. *Flory*, 141 F. Supp. 248, *aff'd. per curiam* 4 Cir., 237 F. (2d) 597; *Willie* v. *Harris County*, 202 F. Supp. 549; *Hampton* v. *City of Jacksonville*, 304 F. (2d) 319; *Hampton* v. *City of Jacksonville*, 304 F. (2d) 320, *cf. Simkins* v. *City of Greensboro*, 246 F. (2d) 425; *Shuttlesworth* v. *Gaylord*, 202 F. Supp. 62.

In *Tonkins* v. *City of Greensboro, supra,* Negro citizens of the city of Greensboro instituted suit (1) to enjoin the city from operating a city-owned swimming pool on a racially segregated basis and (2) to enjoin the city from selling the pool in question solely to avoid having to operate it in such fashion. In its opinion the District Court stated the question presented by the request for an injunction forbidding the contemplated sale, and the law applicable to that question, in language sufficiently significant to merit extended quotation in this brief (162 F. Supp. at 555-557):

> *"Whether defendants may sell Lindley Park Swimming Pool for the sole purpose of avoiding the duty imposed upon them to permit use of the pool by both Negro and white residents of Greensboro under like terms and conditions, and for the sole purpose of defeating the constitutional rights of plaintiffs, and others similarly situated, to use the swimming pool under the same terms and conditions applicable to white citizens.*
>
> * * *
>
> "The plaintiffs allege and contend that the facts, when viewed realistically, conclusively show that the City of Greensboro resolved to close its swimming pools and undertake their sale for the sole purpose of avoiding their duty to operate the pools on a racially integrated basis, and for the sole purpose of defeating the rights of plaintiffs to use the Lindley Park Swimming Pool under the same terms and conditions applicable to white persons. The defendants on the other hand contend that the facts simply show that the City Council, recognizing that if it continued to operate public swimming facilities it must operate them on a racially integrated basis, and being of the opinion that racial integration of such facilities would disrupt the existing harmonious relationship existing between the two races, and would seriously impair the usefulness and economic value of these properties, and might lead to pub-

lic disorder, decided that it was in the best public interest to close and sell these facilities at public auction and use the proceeds for other recreational uses and purposes which would be of more benefit to a greater number of its citizens.

* * *

"The question here presented is whether the defendants have the right to close or sell the Lindley Park Swimming Pool rather than to operate it on an integrated basis. The plaintiffs contend that the answer to this question depends upon whether there is a duty imposed upon the defendants to support the Fourteenth Amendment to the Constitution of the United States. There is no question but that the defendants do have a positive duty to support the Fourteenth Amendment and other provisions of the Constitution of the United States, as these provisions are interpreted by our courts, but the question still remains as to whether or not the Constitution of the United States imposes upon a municipality the positive duty to own and operate recreational facilities.

"The plaintiffs concede that this is the first case in which the right of a state or municipality to close or sell public facilities has been challenged as violative of the Constitution of the United States. Under these circumstances, they are unable to cite any authority in direct support of their position. They seek to establish as a legal theory the proposition that there is a denial of equal rights where the purpose of the closing or sale is to avoid the necessity of operating the facilities on a racially integrated basis.

"The Court is not aware of any law in North Carolina which requires a municipality to construct or operate swimming pools or other recreational facilities.

* * *

"*In the final analysis, the plaintiffs can only complain of discrimination or unequal treatment. If the*

swimming pools are closed to all, or disposed of through a bona fide public sale, there can be no unequal treatment and, therefore, no racial discrimination. No citizen of Greensboro will have access to municipal swimming facilities.

"Unless persons under the same circumstances and conditions are treated differently there can be no discrimination. No person has any constitutional right to swim in a public pool. All citizens do have the right, however, if a public swimming pool is provided, not to be barred therefrom solely because of race or color. If the swimming pools are closed or sold, the rights of all groups will be equal, and it must follow that the closing or sale will not discriminate against anyone." (Italics partially supplied)

Upon appeal the decision of the District Court was affirmed by the Court of Appeals for the Fourth Circuit which, in its *per curiam* opinion, declared (276 F. (2d) at 890):

"Faced with a demand by Negro residents of Greensboro, North Carolina, for admission to the municipal swimming pool theretofore reserved for white persons only, the City Council of Greensboro decided to close and sell the pool.

* * *

"The defendants acknowledge, as they must, that a municipality may not exclude, on account of race, members of the public from the use of any of its facilities. E. g., Dawson v. Mayor and City Council of Baltimore, 4 Cir., 1955, 220 F. 2d 386, affirmed 1955, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774; Holmes v. City of Atlanta, 1955, 350 U.S. 879, 76 S.Ct. 141, 100 L. Ed. 776. On the other hand, *it is not contended by the plaintiffs that the City of Greensboro may not at will cease to provide public swimming facilities.*" (Italics supplied)

In *Gilmore* v. *City of Montgomery, supra*, Negro citizens of the city of Montgomery instituted suit to enjoin the city from operating certain city-owned parks on a racially segregated basis. Subsequently, the city closed the parks in question to all members of the public. Granting the requested injunction, effective upon the reopening of such parks, the District Court pointed out (176 F. Supp. at 780):

> "It should now be made clear that all this Court now holds is simply that insofar as is legally required *the City of Montgomery, Alabama, need not operate any public parks or make available to its citizens any recreational facilities; all public parks and all recreational facilities may remain closed for as long as the City—acting through its elected officials and agents—sees fit to keep them closed.* However, when and if the parks are reopened as public parks each must be available for the benefit of all the public regardless of race or color upon a nondiscriminatory basis." (Italics supplied)

Upon appeal the judgment of the District Court was affirmed by the Court of Appeals for the Fifth Circuit, which, in its opinion, observed (277 F. (2d) at 368-369):

> *"We agree with the district court that no law, State or Federal, requires the City to operate public parks. Closing the parks does relieve, at least temporarily, any discrimination against the plaintiffs and other Negroes.* That is, however, a Pyrrhic victory indeed, for it comes at the expense of depriving all persons in the City of public park and recreational facilities.
>
> "In its resolution closing the parks, the Board of Commissioners referred to 'grave problems involving the welfare and public safety of the citizens of the City of Montgomery,' and stated that, 'the members of the Commission are of the opinion that it is to the best

interests of the citizens of Montgomery that said parks be closed.' *That is a matter committed to the wisdom of the members of the Board of Commissioners, and is not subject to review by this Court in the absence of some violation of the Constitution of the United States.*

"Unfortunately, the public parks of the City of Montgomery are comparatively small in size. The largest, Oak Park, consists of about 40 acres in the form of a square. If public parks no larger than that are operated on a non-segregated basis, the probable breach of another right becomes imminent; that is, the right of each person to select his own associates. If the attempted operation of such small public parks on a non-segregated basis, without any advance planning, should result in the full use of all of the parks by Negroes and their non-use by whites, *then it cannot reasonably be anticipated that the City will continue to operate and maintain any parks.* Without wise advance planning, and considerable self-discipline and forbearance on the part of citizens of all races, *it may be inevitable that the City of Montgomery for a long time in the future will be totally deprived of parks and recreational facilities.*" (Italics supplied)

Especially significant with respect to the instant proceedings is the following observation of the Court (277 F. (2d) at 368, footnote 4):

"In our opinion, *the closing all of the public parks of the City does not violate the equal protection of the laws of the citizens of Montgomery under the doctrine of James V. Almond, D.C.E.D. Va. 1959, 170 F. Supp. 331; James* v. *Duckworth, D.C.E.D. Va. 1959, 170 F. Supp. 342, and Harrison* v. *Day, 1959, 200 Va. 439, 106 S. E. 2d 636.*"

In *Clark* v. *Flory, supra,* suit was instituted by Negro residents of South Carolina to enjoin alleged racial discrim-

ination in the operation of Edisto Beach State Park. While the suit was pending, the State Legislature enacted a statute providing that the park should be closed and remain closed until further action of the Legislature. Thereupon the District Court dismissed the suit as moot and stated (141 F. Supp. at 249-250):

> "Since the Edisto Beach Park has been closed by an Act of the Legislature and cannot be reopened except by another Act of the Legislature, there is no question for the Court to pass upon.
>
> * * * *
>
> "In the instant case there is no present necessity for any judgment for there is no controversy. Edisto Beach State Park has been closed to all.
>
> "*No one contends that this Court has the power to require the State of South Carolina to operate any park. This Court cannot by mandamus order the reopening of the closed park.* If it enjoined the defendants from operating a segregated park, it would be doing a futile thing, as there is no park in operation in Charleston County at the present time, nor is there any immediate prospect that the Edisto Beach State Park will be in operation.
>
> * * *
>
> "I do not feel that there is any necessity of issuing a declaratory judgment on this point *since the park is closed and no question of the rights of the plaintiffs can arise until the park is opened by Legislative action.*" (Italics supplied)

Upon appeal, the decision of the District Court was affirmed by the Court of Appeals for the Fourth Circuit in a *per curiam* opinion which pointed out that "in view of the fact

that the park had been closed by act of the Legislature, there was no basis for the issuance of an injunction with regard to its use." *Clark* v. *Flory*, 237 F. (2d) 597.

In *Willie* v. *Harris County, supra*, Negroes of Harris County, Texas, instituted suit to enjoin alleged racial discrimination in the operation of Sylvan Beach Park, a public recreational facility owned and administered by Harris County. Granting the requested injunction, the District Court admonished (202 F. Supp., at 552):

> "*While there is no constitutional compulsion directed toward a state or its subdivisions to furnish recreational facilities*, nevertheless, if the affirmative choice is made, 'So long as such facilities are open to use by the public, the only lawful and constitutional use thereof is on an equal basis without discrimination in any form on account of color or race.' Shuttlesworth v. Gaylord, Civil Action No. 9505, 202 F. Supp. 62 (D.C.N.D.Ala. 1961)."

In *Hampton* v. *City of Jacksonville*, 304 F. (2d) 319, Negro plaintiffs filed a petition praying that defendant city officials be held in contempt for violation of an injunction precluding racial discrimination in the operation of certain municipal swimming pools. The failure of the city to continue the operation of such swimming pools constituted the basis of the requested citation. Affirming a judgment of the District Court declining to hold the defendants in contempt, the Court of Appeals for the Fifth Circuit, in a brief *per curiam* opinion, observed (304 F. (2d) at 319):

> "In light of the findings of fact made by the trial court, the only remaining question present in this appeal has been decided adversely to appellants by this Court in City of Montgomery, Ala. v. Gilmore, 5 Cir.,

277 F. 2d 364. On the strength of that opinion we cannot say that the trial court erred in declining to adjudge the defendants, the appellees here, in contempt of court for failing to continue the operation of the swimming pools in the City of Jacksonville."

In *Hampton* v. *City of Jacksonville*, 304 F. (2d) 320, Negro plaintiffs instituted an action against the city and individual purchasers of two golf courses formerly owned by the city to enjoin defendants from restricting the use of the golf courses in question to white patrons. Reversing a judgment of the District Court in favor of defendants, the Court of Appeals for the Fifth Circuit held that since the golf courses were sold upon condition that they continue to be used in such manner that the public might still enjoy their benefits, with provisions for reservation of title for breach of condition, such courses could not be operated on a racially segregated basis. However, during the course of its opinion the Court emphasized (304 F. (2d) at 322):

> *"On the other hand, it is clear, and it is conceded by the appellants, that there is no requirement under the Fourteenth Amendment or otherwise that a city must continue to operate such public amusement facilities as a golf course if it decides for any reason that it no longer wishes to do so.* See Frank Hampton et al. v. City of Jacksonville, Fla., 5 Cir., 304 F. 2d 319, in which we have held that the City of Jacksonville has the legal authority to withdraw from the field of operating swimming pools completely, if it desires to do so." (Italics supplied)

Finally, in the case at bar, the Court of Appeals commented upon the situation which exists with respect to the schools of Prince Edward County in the following manner (322 F. (2d) at 337):

"Similarly, when there is a *total cessation of operation of an independent school system, there is no denial of equal protection of the laws,* though the resort of the poor man to an adequate substitute may be more difficult and though the result may be the absence of integrated classrooms in the locality.

"This we held in a different context in Tonkins v. City of Greensboro, 4 Cir., 276 F. 2d 890, affirming 162 F. Supp. 549. Faced with the necessity of desegregating the swimming pools it owned, the City of Greensboro, North Carolina, chose instead to sell them. Upon findings that the sale of the pool, which the City had theretofore reserved for use by white people only, was bona fide, it was held that *there had been no denial of the constitutional rights of the Negro plaintiffs, though the pool was thereafter operated on a segregated basis by its private owners.*

"Similarly, when a state park was closed during pendency of an action to compel the state to permit its use by Negroes on a nondiscriminatory basis, we held that closure of the park mooted the case requiring its dismissal.

"Other courts have clearly held that a municipality which had been ordered to desegregate facilities which it had operated, may *abandon the facilities without violating the injunctive order or the rights of the Negro plaintiffs.*" (Italics supplied)

This unbroken line of apposite judicial precedent establishes beyond question that the failure to operate public schools in Prince Edward County while such schools are operated in other localities of the Commonwealth infringes no rights secured to the citizens of Prince Edward County by the Fourteenth Amendment. If, as has been demonstrated, local option laws are not antagonistic to any provision of the Constitution of the United States, and if, as has also been demonstrated, a locality may close its public

schools rather than operate them on an integrated basis, certainly there can be no question of the right of local authorities to choose between two separate methods of fostering the education of its citizens.

In this connection, the Constitution and statutes of Virginia permit each locality of the Commonwealth to decide whether it will advance the education of its citizens by establishing, maintaining and operating public schools or by making available tuition grants for the furtherance of such education in nonsectarian private schools, or by a combination of these methods. Whatever decision the individual locality may make, State aid in the form of funds to assist in the support of public schools or State scholarships in furtherance of the education of children in nonsectarian private schools is available to every locality of the Commonwealth on precisely the same terms and conditions. Surely, it lies within the competency of the State to accord such a choice to its various localities, without transgressing any right secured to the citizens of any locality by the Fourteenth Amendment.

Hall v. *St. Helena Parish*, 197 F. Supp. 649 (hereinafter referred to as "Hall"), does not support an opposite view. In that case, a three-judge District Court held a certain act of the Louisiana Legislature invalid "on two counts." First because the court found the statute to be a "transparent artifice designed to deny the plaintiffs their declared constitutional rights to attend desegregated public schools" and secondly because its application in one parish "would unfairly discriminate against residents of that parish, irrespective of race." We shall presently treat with the second basis of decision. First, however, it should be made crystal clear that the decision in "Hall" was but another part of the continuing struggle between the Federal Court and the

Louisiana Legislature and that the reaction of the Court to the purpose which it attributed to the Act was so profound that no fair minded man should give weight to the second basis of the decision.

Even a casual reading of the first section of the opinion will reveal that the Court's reaction was startlingly sharp. A selected group of passages will serve to illustrate the point. Rarely will one find a more shocking opening sentence:

> "Undeterred by the failure of its prior efforts, the Louisiana Legislature continues to press its fight for racial segregation in the public schools of the State." (197 F. Supp. at 650)

Referring to the case of *Cooper* v. *Aaron*, 358 U. S. 1, for the phrase "evasive schemes for segregation" the Court said:

> "The Louisiana Legislature has confected one 'evasive scheme' after another in an effort to achieve this end. This Court has held these unconstitutional in one decision after another affirmed by the Supreme Court. Yet they continue to be enacted into law." (197 F. Supp. at 651)

Other Statements which indicate the mood of the Court follow:

> "* * * the Legislature was at pains to use language disguising its real purpose." (197 F. Supp. at 652)
>
> "* * * to the uninitiated the statute appears completely innocuous." (197 F. Supp. at 652)
>
> "* * * the *sub-surface* purpose of Act 2 * * *." (Italics supplied) (197 F. Supp. at 651)

Note the meaningful quotation marks around the word "private" and the word "closed" (197 F. Supp. at 651-655).

Having disregarded the time-honored rule to the effect that motive is immaterial in judging the validity of an Act of a Legislature and having found no improper motive on the face of the Act the Court "undeterred by the failure of its prior efforts" continued to press its fight by referring to the newspapers to discover the motive of the legislature. It declared:

> "The sponsors of this legislation * * * have spelled out its real purpose." (197 F. Supp. at 652)
>
> "* * * the purpose of the packaged plan was to keep the state in the business of providing public education on a segregated basis." (197 F. Supp. at 653)

While we believe the mood of the Court, which is indicated by its intemperate remarks, nullifies any persuasive value of the remainder of its opinion, we further confidently assert that no court could in good conscience direct such language toward Virginia.

In Louisiana the Court had before it a new enactment on "local option." Despite the repeated efforts of the Solicitor General in his brief to create the impression that the State of Virginia has engaged in a "surrender in favor of its own political subdivisions" in order to "escape liability by appointing agents" (see, Brief for the United States as *amicus curiae*, p. 21), it is clear that the "local option" situation in Virginia is not a part of any scheme or device such as was before the Court in *Hall*. In Virginia "local option" has been in effect for more than half a century. The adoption of "local option" in Virginia had no racial motive (and motive was the only racial issue in *Hall*). In Louisiana the

Court found the purpose of the local option law to be *that of keeping the state in the business of providing public education on a segregated basis*—and further the Court found that the questioned Act and related legislation would accomplish the purpose. Without waiving our firm conviction that the motive behind legislation is immaterial in judging its validity, we assert that in Virginia since "local option" had reached its majority years before the "Brown Case"—no such motive can be assigned to our laws. Why should anyone attribute such motive to Virginia when in Virginia, viewing all public schools in the State as a whole, there remains no segregated system to preserve. Further, whatever may be the effect of the laws of Virginia, they have not operated to prevent integration of the races in public schools, as this Court well knows. No one can say in good conscience that the school code and Constitution of Virginia constitute a "transparent artifice."

A comparison of the Louisiana legislation with the legislation in effect in Virginia will quickly convince one that they are completely dissimilar—one striking example is the fact that the tuition grant program of Virginia is devoid of racial connotations—in Louisiana "subsidies would afford entry to segregated schools alone" (197 F. Supp. at 659).

The attempt by the Court to escape the conclusive effect of the line of decisions inaugurated by the *Tonkins* case, *supra*, is obviously tortured and wholly unsuccessful. In this connection, the Court initially declared (179 F. Supp. at 656-657):

> "The St. Helena Parish School Board may not be discriminating geographically when it expends the full measure of its power by closing all schools under its control, but that does not make the rule of Tonkins and Gilmore applicable. Indeed, even if recreation is

> viewed in the same constitutional light as public education, the rationale of those cases applies *only when the facilities sought to be closed are locally owned, financed and administered, and the state itself is not directly concerned in their operation.* See City of Montgomery, Alabama v. Gilmore, supra, 277 F. 2d 368, note 4. In such case, only local action is involved, and so long as the closure order is general and affects all residents equally, there is no discrimination at any level. *But the same principle does not excuse inequalities in a statewide, centrally financed and administered system of public institutions.*" (Italics supplied)

The Court then proceeded to examine the character of public education and the system of public school operation in Louisiana in an effort to bring that system within the scope of the artificial exception manufactured by the Court in the concluding sentence of the above-quoted passage. In this respect, the Court observed (197 F. Supp. at 657-658):

> "There can be no doubt about the character of education in Louisiana as a state, and not a local, function. The Louisiana public school system is administered on a statewide basis, financed out of funds collected on a statewide basis, under the control and supervision of public officials exercising statewide authority under the Louisiana Constitution and appropriate state legislation.
>
> * * *
>
> "Despite defendants' argument to the contrary, none of the recent amendments to Article XII of the Louisiana Constitution have affected the control of public education by the state. See Acts 747 and 752 of 1954; Act 557 of 1958. Indeed, in its most recent form, that Article still provides for a single state system:
>
> > " 'The Legislature shall have full authority to make provisions for the education of the school

> children of this State and/or for an educational system which shall include all public schools and all institutions of learning operated by State agencies. * * *' La. Const. Art. XII, § 1, L.S.A.
>
> "Public education remains the concern of the central state government, and ultimate control still rests with the State Legislature and the State Department of Education.
>
> * * *
>
> "The plain fact is that the state has not even made a pretense of abandoning its control of education to autonomous subdivisions.
>
> * * *
>
> *"When a parish wants to lock its school doors, the state must turn the key."* (Italics supplied)

It is apparent at a glance that the public school system which the Court found to exist in Louisiana is not even remotely similar to that which has for generations been established in Virginia. In essence the Court found that control of the public schools in Louisiana "rests with the State Legislature" and that when "a parish wants to lock its school doors, the state must turn the key." *Id.* at 657-658. Quite to the contrary, in Virginia—as has been conclusively demonstrated in the case at bar—when a locality exercises its local option and elects to refrain from operating public schools, the locality turns the key. Indeed, each particular locality "must turn the key" itself, for it is perfectly clear from the decision of the Supreme Court of Appeals of Virginia in *Harrison* v. *Day*, *supra*, that the State may not do so. In the *Harrison* case, the State attempted to turn the key upon certain schools in various localities of the Commonwealth by enactment of a series of key-turning

statutes, all of which were subsequently invalidated as antagonistic to the "local option-local control" school structure embraced in the organic law of the State.

Moreover, as pointed out in Argument III of this brief, if a locality has exercised its option and declined to operate public schools, the State may not itself reopen and operate them. No clearer evidence of this truth is available than the fact that just such a situation has obtained in Prince Edward County since 1959.

However, the principal objection which counsel for the State Board raise to the Court's attempt in *Hall* to distinguish the *Tonkins* and *Gilmore* cases is not that the situation concerning the school system in Louisiana is demonstrably different from that which exists in Virginia. Our objection is rather that the purported distinction is utterly irrational and without any support whatever in logic or in law. In this connection, the Court initially stated that the rationale of the *Tonkins* and *Gilmore* cases applies *only* "when the facilities sought to be closed are locally owned, financed and administered, and the state itself is not directly concerned, in their operation." *Id.* at 657. Is this an accurate statement of the law? If the Lindley Park swimming pool in the *Tonkins* case had originally been constructed with both State and local funds under a State administered program which made State monies available to the participating localities on a matching basis, would the Court's decision in that case have been different? *Certainly it would not.* If a Virginia locality, which had elected to establish a local detention home with matching funds from the State under the Juvenile Detention Facilities Act of Virginia, subsequently elected to close that facility rather than operate it on an integrated basis, would the rule of *Tonkins* be inapplicable simply because State funds had initially been

utilized in constructing the facility? Surely, it would not. Obviously, the limitation upon the rationale of the *Tonkins* and *Gilmore* cases sought to be imposed by the Court in *Hall* is utterly artificial and wholly unsupported by the language of either of those decisions.

Finally, the Court concludes its attempt to escape the *Tonkins* rule with the observation that this rule "does not excuse inequalities in a state-wide, centrally financed and administered, system of public institutions." *Id.* at 657. Taken literally, this declaration would mean that a State may not—consistently with the Fourteenth Amendment—inaugurate a centrally financed and administered system of public parks or hospitals or libraries *without establishing one such facility in each locality of the State.* Surely, no matter how the statement is taken, it cannot mean that a State may not—consistently with the Fourteenth Amendment—institute a program which involves State aid only to localities which elect to participate in the program, i.e., a State-wide program on a local option basis. Utilizing the State-local hospitalization program established by Section 32-292 *et seq.* of the Virginia Code as an example, may not the governing body of a locality be permitted to decline participation in that program without such action infringing the constitutional rights of the citizens of that locality? If one locality declines to participate in the program, must the State—to avoid geographical discrimination—terminate State aid to localities which do elect to participate. Moreover, if a local school board should decline to participate in the National Defense Education program—which makes matching funds available to localities for approved programs of science, mathematics and modern foreign languages—*must the Federal government discontinue the program in all localities to avoid geographical discrimination?*

In short, may one locality decline to participate in a State or Federal program while the State or Federal government permits other localities to maintain such programs? The answer is obvious.

The Court's attempt to evade the decision in the *Salsburg* case, *supra,* is even more desperate and is quite properly tucked away in a footnote, 197 F. Supp. at 658 n. 29. At a time when each State could constitutionally choose whether or not it would adopt the exclusionary rule of *Weeks* v. *United States,* 232 U. S. 383, this Court decided that a State could validly refer this choice to the individual localities to be determined by local option. Counsel for the State Board submit that the principle of the *Salsburg* case would be, and still is, applicable to any subject—such as whether or not public schools will be operated—upon which the States may still make a choice. The fact that *Mapp* v. *Ohio,* 367 U. S. 643, has removed the above mentioned evidentiary rule from the area of individual State choice does not in any way affect the applicability of the *Salsburg* rationale to the operation of public schools—a matter still open to State selection. Unless this Court proposes to make the operation of public schools constitutionally compulsory on each State and on every individual political subdivision of each State—as the Supreme Court ultimately made the *Weeks* rule compulsory—the distinction attempted in *Hall* is completely irrelevant.

Nor does the attempt to emphasize that the matter under consideration in the *Salsburg* case was "procedural" rather than "substantive" add anything to the purported distinction. Substantive matters—such as whether or not certain acts shall constitute crimes in one locality and not in another under local option Sunday-closing, Sunday movies, sale of alcoholic beverages and compulsory school attendance ordi-

nances—may also be left to the individual localities without infringing any rights secured to the citizens of such localities by the Fourteenth Amendment. Counsel for the State Board submit that such irrelevant distinctions as those imagined in the *Hall* case properly deserve their footnote fate.

Considering the decision in the *Hall* case, the Court of Appeals for the Fourth Circuit declared (322 F (2d) at 337-338).

> *"The decision in Hall* v. *St. Helena Parish School Board is not a departure from the principle.* There, it appeared that, confronted with court orders to desegregate schools in certain parishes in Louisiana, the Governor of that State called an extraordinary session of the Legislature, which enacted a number of statutes designed to frustrate enforcement of the court's orders. One of the statutes provided for the closure of all schools of a parish upon a majority vote of the parishioners. It was accompanied by other statutes providing for the transfer of closed schools to private persons or groups, providing for educational cooperatives and regulating their operations, providing tuition grants payable directly to the school and not solely to the pupils and their parents, providing for general supervision of the 'private schools' by the official state and local school boards, and providing, at state expense, school lunches and transportation for pupils attending the 'private schools.' Construing all these statutes together, as it was required to do, the Court, with abundant reason, concluded that the statutes did not contemplate an abandonment of state operation of the schools but merely a formal conversion of them with the expectation that the schools would continue to be operated at the expense of the state and subject to its controls. Desegregation orders may not be avoided by such schemes, but there is noth-

> ing in the *Hall* case which suggests that Louisiana might not have withdrawn completely from the school business. *It was only because it had not withdrawn that the statutes which composed its evasive scheme of avoidance were struck down.*" (Italics supplied)

Whatever use this Court makes of *Hall*—and it is obvious from the language in its opinion that the District Court leaned heavily upon it—this Court should never lose sight of the fact that no one conceived that a single District Judge could give the relief sought. *Hall* is clear authority for the requirement of a three-judge Court in the case at bar.

Finally and the most compelling distinction between Prince Edward and St. Helena is that of remedy. In the *Hall* case, all the Court was required to do was enter an order enjoining action under a particular statute. Such is not the case in Prince Edward. In the case at bar, there is no statute before the Court for constitutional review except the tuition grant statute which has no bearing on the opening of public schools in Prince Edward County.

It is manifest from a mere reading of their brief that petitioners fully realize they cannot prevail in the instant litigation unless this Court can be induced to *change the law* in petitioner's favor. The majority opinion of the Court of Appeals in the case at bar is a fully precedented and thoroughly definitive exposition of the existing law and is absolutely dispositive of the fundamental constitutional issues contrary to the positions of the petitioners. The conclusive effect of that decision upon the petitioners can be avoided only by the judicial creation of a *new constitutional right*, which does not now exist and for which there is no warrant whatever in law.

Petitioners contend that the Fourteenth Amendment affirmatively confers upon them the right to be provided with

public schools in the political subdivision in which they reside. They claim a right, supposedly derived from the Fourteenth Amendment, to be educated in public school buildings located in Prince Edward County, staffed with public school teachers and administered by public school authorities in that county.

Petitioners' brief is suffused with oblique phrases, deliberate generalities and conscious semantics which provide abundant evidence of the dilemma in which they have placed themselves under existing law and the need for a declaration by this Court of a new constitutional right if petitioners are to succeed in this case. Thus, petitioners resort to such phrases as "the declared rights of Negro children to unsegregated public education" and "their constitutional rights to a public school education unimpaired by the burden of racial discrimination" and "equal educational opportunities in public schools . . . as commanded by the Constitution of the United States" and "the declared rights of petitioners to equal educational opportunities" and the "duty to provide unsegregated public education." See, Brief for Petitioners, pp. 3, 4, 5, 12, 23. By repetitious use of such language petitioners seek to delude all who read their brief into the belief that they not only have a constitutional right to desegregated education in *such public schools as may be operated* in Prince Edward County (which right they do possess), but that they also have a further right to compel the local authorities to operate public schools for their benefit.

Of course, this latter "right" simply does not exist, as numerous decisions have made perfectly clear. See, *James* v. *Almond, supra; Allen* v. *County School Board of Prince Edward County, supra; Griffin* v. *County School Board of Prince Edward County, supra.* Quite to the contrary, the

right of local school authorities to discontinue the operation of all public schools in a particular locality, rather than operate such schools on a racially integrated basis, is everywhere affirmed. As the Court of Appeals pointed out in the case at bar (322 U. S. at 337):

> "Other courts have clearly held that a municipality which had been ordered to desegregate facilities which it had operated, may *abandon the facilities without violating the injunctive order or the rights of the Negro plaintiffs.*
>
> * * *
>
> *"Nothing to the contrary is to be found in James* v. *Almond.* There, the Court had ordered the admission of seventeen Negro pupils into six of Norfolk's schools theretofore attended only by white pupils. Under Virginia's 'Massive Resistance Laws,' the Governor of Virginia thereupon seized the six schools, removed them from Norfolk's school system and closed them. All other schools in Norfolk and elsewhere in Virginia remained open. It was held, of course, that the statutes under which the Governor acted were unconstitutional, for Virginia's requirement that all desegregated schools be closed while segregated schools remained open was a denial of equal protection of the laws. *There was no suggestion that Virginia might not withdraw completely from the operation of schools or that any autonomous subdivision operating an independent school system might not do so."* (Italics supplied)

Continuing their attempt to incorporate an *alleged* right to be provided with public schools in Prince Edward County with their *admitted* right to racially non-discriminatory access to such public schools as may be operated in that county, petitioners assert that the election of the authorities of Prince Edward County to exercise their local option and

decline to operate any public schools constituted "open and defiant violation of petitioners' constitutional rights and the federal courts' commands." See, Brief for Petitioners, p. 25. This assertion has been given the lie both by the District Court and the Court of Appeals for the Fourth Circuit. Thus, in its memorandum opinion of June 14, 1961, the District Court—commenting upon a contention by the Attorney General of the United States that the State was unlawfully circumventing the prior orders of the Court —flatly declared (R. 167):

> "In support of this contention, the Attorney General seeks to parallel the situation in Prince Edward County with the former situation in Little Rock and New Orleans. The facts in these cases do not justify such a comparison. In the latter cases, open defiance of Federal Court orders was obvious. In Virginia this complex problem has been and is being solved in a lawful and proper manner through the courts. *There has been no known defiance of this Court's orders by either the State of Virginia or the County of Prince Edward.*" (Italics supplied)

Speaking to the same subject, the Court of Appeals for the Fourth Circuit was equally positive in its condemnation of petitioners' assertion (322 U. S. at 336):

> "The plaintiffs' theory may also be summarily dismissed insofar as it is viewed as a contention that the *closure of the schools was a violation of the order of the District Court entered in compliance with the direction of this Court.* The injunctive order, entered when the School Board and its Division Superintendent were the only defendants, required them to abandon their racially discriminatory practices. Without funds, they have been powerless to operate schools,

but, even if they had procured the closure of the schools, *they would not have violated the order for they abandoned discriminatory admission practices when they closed all schools as fully as if they had continued to operate schools, but without discrimination.*" (Italics supplied)

In light of these observations, one fact is crystal clear—at no time during the entire history of this litigation has any official of the State of Virginia or Prince Edward County ever violated or defied any order entered by any Federal court. No order has ever been entered in this litigation—nor can any order ever properly be entered—judicially commanding the local authorities of Prince Edward County to levy taxes, appropriate funds and operate public schools against their will.

In the absence of the operation of any public schools in Prince Edward County, it is manifest that petitioners' rights to "equal educational opportunities" have been fully recognized and preserved in this case. Petitioners' educational opportunities are precisely equal to those of any other child of school age in that county. Tuition grants in furtherance of their education at public schools located outside Prince Edward County or at nonsectarian private schools wherever located are—and always have been—available to petitioners upon precisely the same terms and conditions as they are available to other children of school age in the county. In this connection, the Court of Appeals pointed out (322 U. S. at 335):

"Negro citizens of Prince Edward County at first *made no effort to provide schools for their children. They declined proffered assistance in such an undertaking.* Some of their children obtained admission to

public schools in other counties of Virginia and, since 1960, *obtained or were eligible for, tuition grants when they did so.*" (Italics supplied)

Clearly, the petitioners' want of formal education for the past four years has been occasioned solely by their own conscious choice and deliberate default.

In the case at bar, petitioners come before this Court requesting that the law be broken for their benefit. They ask that the well-settled, fully precedented and everywhere recognized *constitutional right* of a locality to discontinue operation of a public facility at will be utterly destroyed, and that a new—presently nonexistent—right be created for the petitioners by this Court. Unless the petitioners are to be *unequally* favored over other children throughout the nation, the declaration they seek must necessarily be that every child in every political subdivision of the United States has a constitutional right under the Fourteenth Amendment to be educated in public schools located in the political subdivision in which he resides, and no political subdivision in the nation may, consistent with the Fourteenth Amendment, elect to further the education of its citizens by tuition grants or scholarship funds or educational television or any form of education other than that disseminated in public school buildings owned, operated and administered by public school authorities.

Counsel for petitioners do not even attempt to cite one line or one word of decisional authority—or refer to any historical context of the Fourteenth Amendment—from which even remote justification for such an appalling declaration can be derived. On the contrary, they call upon this Court simply to make the bland assertion that it is so. Obviously, the constitutional right they seek to have this

Court create must be "manufactured out of whole cloth." *Wesberry* v. *Sanders*, ... U.S. ..... (dissenting opinion).

If this Court accedes to petitioners' request, what relief can the Court give? The Solicitor General in his brief suggests that the ultimate solution to this case lies in an order directing the Board of Supervisors of Prince Edward County to levy a tax and appropriate the proceeds for the operation of public schools in the County. As authority for this astounding proposition he cites cases that are not remotely in point. See, Brief for the United States, Amicus Curiae, p. 38. At this point in his brief the Solicitor General lays down bald principles without rationale or comment and cites supposedly supporting authority without a shadow of analysis of the cases cited, their factual background nor the legal premise on which a particular result was predicated.

We reiterate our bald assertion that not one of the cited cases is remotely in point. Nine cases are cited by the Solicitor General as covering his assertion that there is no "inhibition to a form of decree which expressly directs the county authorities to levy necessary taxes." Let us examine the cases. In all nine of the cases the plaintiff is seeking to recover a debt. In all nine a judgment for a sum certain is involved. In all nine the plaintiff was asserting a contract right. Where, then, is the similarity? Why are they said to control? The only similarity is that in the eight cases involving bonds of counties or cities, the Court directed the legislative body involved to perform its contract obligation to lay a tax, and in *Virginia* v. *West Virginia*, 246 U. S. 565, posed a threat to West Virginia that it might require the State to levy a tax to meet the obligation which the State assumed in becoming a separate state. In not one of the cited cases did the Court perform the

original legislative function of determining whether or not the taxpayers' money should be expended in a particular way. In each of the cases cited, the legislative body involved had already determined upon the expenditure—the people or their representatives had decided to aid the railroad, build the bridge, construct the highway or assume the obligation. In each case the legislative body involved had engaged in a binding agreement to raise the necessary funds by taxation to be expended for such purpose. The legislative action necessary to create the debt and impose upon the people an obligation to pay it with their taxes had been taken by their chosen legislative officials. All that remained was to pay the debt. Upon those facts this Court in the eight bond cases, required the legislative body involved to perform a duty which was no longer discretionary even under state law. The Court required compliance with the terms of an agreement—discretion was no longer involved for it had already been exercised. In those cases, it is clear that the Court acted to vindicate a liquidated *contract* right—not a constitutional right—and accorded the plaintiffs only that relief which they would have been awarded under State law had the case been instituted in a State Court. In *Virginia* v. *West Virginia, supra*, while a contract approved by the Congress of the United States was involved and a judgment for a sum certain was held by the plaintiff, this Court did not enter an order in the nature of a mandamus. The Court clearly founded its jurisdiction upon Article III, Sect. 2 of the Constitution that "the judicial power shall extend * * * to controversies between two or more states." This distinction alone makes the case meaningless in the context of the case at bar, but interestingly enough the Court considered one facet of the problem which confronts this Court (246 US at 604):

> "But this does not dispose of all the contentions between the parties on the subject, since, on the one hand, it is insisted that the existence of a discretion in the legislature of West Virginia as to taxation precludes the possibility of issuing the order, and, on the other hand, it is contended that the duty to give effect to the judgment against the state, operating upon all state powers, excludes the legislative discretion asserted and gives the resulting right to compel. But we are of opinion that we should not now dispose of such question, and should also now leave undetermined the further question, which, as the result of the inherent duty resting on us to give effect to the judicial power exercised, we have been led to consider on our own motion—that is, whether there is power to direct the levy of a tax adquate to pay the judgment and provide for its enforcement irrespective of state agencies."

Looking then at the case at bar as contrasted with the cited case just discussed, we see the glaring differences. In Prince Edward County there is no debt, no judgment for a sum certain and no contract which may be impaired by the failure to act or by the repeal of a law. In Prince Edward the duly elected legislative body—far from creating a debt and determining that the funds of the taxpayer shall be expended for public schools—has determined to the contrary. Who is to say them nay? Are the people of Prince Edward County to be taxed without representation? Will this Court assume unto itself the legislative function of the Board of Supervisors of the County? We need not engage in futile discussion of whether the elected representatives of Prince Edward County are wise or unwise in their decision not to operate public schools. We need only establish that, if the decision be unwise, the Board of Supervisors of Prince Edward County possesses the sole authority and right to make that decision for the people of the county. If the law

be otherwise, whence came the law? The highest tribunal in the State has found that under State law and the State Constitution, the Board of Supervisors has discretion in the matter and is not subject to mandamus nor compulsion by the General Assembly. *Griffin* v. *Board of Supervisors, etc., supra.* It is manifestly clear, and there is nothing in *Brown* to the contrary, that Virginia's people reserved to themselves, under the 10th Amendment and the State Constitution the right to place control of the operation of their public school system in the hands of local agencies. It is true that this Court held in *Brown* that at some undetermined time between the decision in *Plessy* v. *Ferguson*, 163 U. S. 537, decided in 1896 and May 17, 1954 (the date of *Brown*) the Constitution of the United States was altered by a change in conditions—but clearly before *Brown*, the people of Virginia were free to delegate to political subdivisions the entire control over the public schools in a locality. *Brown* altered the situation only with respect to equality of treatment of members of different races in *such schools as are operated.* The people made the delegation of power to localities when they first made provision for State aid to local schools in 1902. The delegation had nothing to do with *Brown*, nothing to do with race and nothing to do with obeying this Court. In 1902, it never occurred to any Virginian that this Court would someday assume control of even the racial composition of the schools. But when did the Constitution make this latest change which the Solicitor General announces? Is it seriously thought that a Federal Court can require Prince Edward's Board of Supervisors to lay a tax and to operate public schools in that County? If so, how much shall the tax be? What shall be the objects of taxation? What shall be the tax rate? What facilities shall be offered? How many schools shall operate? How

many days each year and how many hours each day? What will be a "public school"? How many students may occupy a classroom and what qualifications must the teacher have? What subjects shall be taught? If educational television proves eminently successful, may the governing body determine to substitute such a system or must public school buildings remain open?

All of these complex considerations, and more, are involved in the legislative decisions which the Solicitor Genral calmly asks this judicial body to make. But, as we have previously noted, no such considerations were involved in decisions which he cited in fancied support of the appalling proposition that this Court is vested with judicial authority to so determine and by decree compel.

We respectfully submit that this Court, no matter how great the desire of its individual members to right what they may perceive to be a wrong, will not disregard every vestige of judicial restraint and launch out into a new and uncharted sea where legislation discretion is laid waste by judicial power!

If this course is to be pursued, however, then this Court should take that action with full knowledge that it does so without prior legal precedent and contrary to the sacred principles on which this Nation was founded. For, if the Court can require a tax for schools today, tomorrow there are books and playgrounds, libraries and swimming pools, roads and bridges, medicine and old age assistance and. . . . ?

"Hard facts make bad law," but the facts are not nearly so bad as would be the hard fact that the children of Prince Edward County gain their public education and lose their respresentative form of government. In the context of this case, this Court has no authority to levy a tax or to require the Board of Supervisors or the State to do so. If it decrees

such authority, it will have amended the Constitution in a fearsome manner. The Father of our Country, in his Farewell Address, uttered words most appropriate to this occasion and while they were not contained in a Court's opinion, they should be required reading for every judge:

> "If, in the opinion of the people, the distribution of modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument for good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance, in permanent evil, any particular or transient benefit which the use can at any time yield."

What then is left? Only the course of action hinted at or threatened by the District Court but requested by no party to this litigation—will this Court seriously consider an injunction against the operation of schools elsewhere in the State? The distinction between *Hall* and the case at bar can in no way be better illustrated than by considering the relief requested. In *Hall* the requested Court action prevented school closing. In Prince Edward, such action is not possible, and counsel for the State Board are confident that this court will not substitute power for judgment, will not turn to a course of action requested by no party and will, therefore, not seek to satisfy "equal protection" by commanding "equal ignorance."

CONCLUSION

For the foregoing reasons, counsel for the State Board submit that this cause should be remanded to the District Court with instructions to dismiss the amended supplemental complaint as to these respondents.

Respectfully submitted,

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PROOF OF SERVICE

I, R. D. McIlwaine, III, one of counsel for the respondents herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of March, 1964, I served copies of the within Brief on Behalf of the State Board of Education and Superintendent of Public Instruction of the Commonwealth of Virginia on the several petitioners herein by mailing same in duly addressed envelopes, with first-class postage prepaid, to their respective addresses of record as follows: Robert L. Carter, 20 West 40th Street, New York, New York, and S. W. Tucker, 214 East Clay Street, Richmond 19, Virginia.

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Assistant Attorney General